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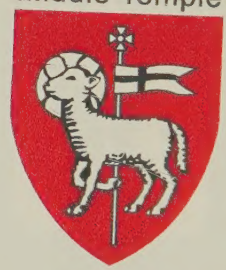
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AND

THOMAS JARMAN, Esq.

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ADVERTISEMENT.

THE Preliminary Dissertation on the Law of Wills has been edited by Mr. BISSET, and the remainder of the Volume by Mr. SWEET.

The reason for introducing a complete collection of Common Testamentary Forms into this Volume is explained at page 429. It may here be useful to observe, that the Clauses are almost invariably complete in themselves, so that a copying clerk will generally be competent to make the rough draft of a Will from a mere list of the distinctive numbers of the clauses intended to be inserted. For convenience, at once of reference and of adaptation, Clauses of the same nature are indicated by the same number, and are distinguished among themselves by letters, thus,—(24 *a*), (24 *b*); while the different members of a Series of Clauses having a unity of purpose, (such as the limitations of a fund in trust for one for life, and then for his children, with provisions for maintenance, &c.), are associated by the same number and letter, and distinguished by superadded small figures, thus,—(43 a^1), (43 a^2), (43 a^3), &c. Where the whole of such a series is intended to be used, it is referred to by the mark of the first number with an &c., thus,—"(43 a^1), &c."

Although the Collection is extensive, it contains few special forms, nearly all the available space having been devoted to variations of the more ordinary provisions, required by the varying fancies of testators. But, as this variety may be perplexing in the hurry of practice, the possessor of the book will, perhaps, find it convenient to select at his leisure, and mark in the table of contents, such forms as he prefers for common use. These will also serve as guides to the variations.

February, 1849.

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Income of a Moiety to Wife during Widowhood; subject thereto, Entirety for Sons at twenty-five and Daughters at twenty-one or marriage, sons' shares being double those of daughters; Substitution of issue of children dying before vesting age; On failure of issue, remaining Moiety to Wife for life, and then Entirety for Niece and her Children, by reference to trusts for daughters; Ultimate bequest to trustees; Maintenance and advancement; Trusts of Daughters' shares, for separate and inalienable use for life; then for children, with clause of Accruer between the children and also between the families; Maintenance; Advancement; Power to bequeath life-interests to husbands, 671.

Immediate trust for Children by Name, and issue of deceased children; Investment of shares of grandchildren; Maintenance and advancement, (applicable to shares in realty), 678.

Immediate trust for Sons at twenty-five or marriage, and Daughters at twenty-one or marriage, (including an illegitimate daughter); Maintenance; a moiety of each daughter's share settled on her and her children, with general testamentary power in default of issue, and ultimate limitation to next of kin; Maintenance of daughter's issue; Vesting of grandsons' shares postponed to twenty-five, if not too remote, 678.

TRUSTS OF SPECIFIC OR RESIDUARY FUNDS OF PERSONALTY—*continued.*

Wife for life; then for issue as she shall appoint; In default, for issue surviving her, per stirpes; Hotchpot, 683.

Immediate trust for [certain of the existing children by name, and all after-born] children, sons at twenty-one, daughters at twenty-one or marriage; Investment, maintenance, and advancement; A moiety of each Daughter's Share Settled on her for life (subject to Cesser on Alienation) and her issue, with power of selection; On failure of daughter's children, for testator's other children or issue living at decease of daughter, as she shall appoint, and, in default, equally, per stirpes; Hotchpot; Maintenance and advancement; Power to Bequeath to Husband a Life-interest in a Moiety as against children, and in the entirety if no children; Power to trustees to Settle the other moieties of shares of daughters marrying under age, 684.

Trusts of general estate for benefit of wife, children, and sister, principally in the form of Annuities and Pecuniary Legacies, 692.

Immediate trust for Children (Except Eldest Son or other child taking the real estates); Accruer of share of any child dying or becoming an elder child during minority; Maintenance and advancement; If no younger child, for only son; if no son, for only child, 692.

Legacy for Children or issue, as Wife shall Appoint by will; In default of appointment, to fall into residue; Residue for Issue at twenty-four or marriage, per stirpes; Share of Son marrying without consent, and dying under twenty-four, settled for benefit of his widow (as to one moiety) for life, and children, subject to testamentary power of selection; If no child, as to one moiety, as he shall by will appoint, and, in default, to his widow; as to the other moiety, for testator's other children; Similar provisions in respect of Daughters' shares; Accruer of shares of residue; Maintenance; Advancement by majority of trustees, 696.

For testator's Issue, per stirpes, at twenty-one; if none, for Widow, if living and unmarried; if not, for sister; Maintenance and advancement, 703.

For Son (by name) attaining twenty-one or leaving issue; Substitution of son's children; Maintenance and advancement out of income or capital; On failure of issue, as to one-fourth, for wife; Remainder settled on three nieces and their children; Maintenance; Accruer; On failure of their issue, for surviving niece, 705.

Separate and inalienable use of step-daughter for life; then as she shall appoint by will; In default, for her executors, &c.; Power to appoint £—— to husband, 708.

One-fourth for Elder Son absolutely; Substitution of his children; Maintenance and advancement; One-fourth to be invested for Younger Son for life, subject to gift over, on Bankruptcy, Alienation, &c., for benefit of his wife and children; Accumulation of income in default of objects; After his death, for his wife and children;

TRUSTS OF SPECIFIC OR RESIDUARY FUNDS OF PERSONALTY—*continued.*

Maintenance and advancement; Ultimate trust in default of issue; Discretionary power to pay the capital to younger son; Remaining fourths settled on Two Daughters and their issue; Maintenance and advancement, 709.

Trusts of one-fourth; As to a Moiety of Income for Son's Widow for life; Subject thereto, the fourth for Grandson; Maintenance and advancement; If grandson die under twenty-one without issue, over, 716.

(*Trusts of residue, and profits of coal works*). Annuity to wife; Residue of Income for Son and Three Daughters for lives; Capital for their children, per stirpes; Accruer; On failure of preceding trusts, to raise £—— for each Child then living of Testator's Brother; and residue for brother; Maintenance and education of legatees for life, and grandchildren, 717.

One moiety for Eldest Son absolutely; If he die before testator, for his wife and children, by reference to the trusts of a legacy; Other moiety for testator's Daughter and her Husband successively for life, and then for her children, 722.

Declaration as to class of children to be entitled, and time of transfer, where prior Life-interests may be Forfeited, 723.

Survivorship and Accruer as to shares of children of sons and a daughter; Ultimate gift to next of kin, 725.

Annuity to Wife for life; Subject thereto, one Moiety for Married Daughter and Her husband successively for Life; then for her Issue Surviving her and her husband, per stirpes (subject to power of selection); On failure of issue, one-half of her moiety for testator's Son, if he survive daughter and her husband; if not, for his widow for life and his surviving issue, per stirpes (subject to power of selection); On failure of such trusts, upon trusts of the other half of the moiety; As to the other half of the moiety, for Unmarried Daughter and her surviving Husband successively for life; then for her surviving issue, per stirpes (subject to power of selection); On failure of such trusts, upon trusts of the first-mentioned half; and on failure of all the trusts of such moiety, as elder daughter shall appoint; and, in default, for her absolutely; Similar trusts of the other moiety for Younger Daughter, &c.; Hotchpot, and maintenance and advancement clauses, 726.

For such Issue as shall survive the widow (tenant for life), and attain twenty-one, or leave issue, per stirpes, 738.

For Children at twenty-five; Substitution of issue of those dying under twenty-five, per stirpes, to take at twenty-one, or twenty-five where not too remote, 739.

For two Cousins for separate use for life; then for their children attaining twenty-one or leaving issue, with cross-limitations; Maintenance and advancement, 740.

TRUSTS OF SPECIFIC OR RESIDUARY FUNDS OF PERSONALTY—*continued.*

Wife for life, for Maintenance of herself and children; then for Children; On failure of children, for Brothers and Sisters for lives, equally, then for issue of brothers and sisters attaining twenty-one or leaving issue, or (being females) marrying, per stirpes, subject to power of selection, 741.

In default of children living to take, for wife, if living and unmarried; if not, for sister, 743.

TRUSTS OF PERSONALTY, (*Short forms*), 743 *to* 768.

Moiety of income to Wife for life; Residue for Issue, per stirpes, at twenty-one or marriage; Maintenance and advancement, 743.

Annuity to Wife; Subject thereto, upon Trusts of Realty, 744.

Residue to Issue, per stirpes, 744.

For Issue, per stirpes, attaining twenty-one or leaving issue; Shares of girls for separate [and inalienable] use, 745.

For Issue, per stirpes, sons attaining twenty-one or leaving issue, daughters attaining twenty-one or marrying; Shares of girls for separate and inalienable use, 745.

For Issue surviving wife and attaining twenty-one or marrying, per stirpes, 745.

For Son at twenty-one; Substitution of his issue attaining twenty-one or leaving issue or (daughters) marrying, per stirpes; On failure of trusts, over, 746.

Residuary realty and personalty for Widow for Life, for Maintenance of herself and children; then for Issue, per stirpes, subject to power of selection, 746.

For Issue, per stirpes, at twenty-one or marriage; Maintenance; Shares of Daughters Settled on them and their issue, subject to power of selection; Advancement, 747.

For Issue, per stirpes, at twenty-one or marriage [except one son], 748.

For Children and Issue of Deceased Children for Life, and then to their issue at twenty-one, subject to power of selection; Cross-limitations; Hotchpot, 748.

Income during Wife's life for equal benefit of herself and issue, per stirpes; after her decease, for Issue, 749.

Income to Wife during widowhood; then to Children (including stepdaughter) at twenty-one or marriage (except issue taking real estate); Maintenance, 749.

Income of realty and personalty for Wife during widowhood for Maintenance of herself and children; after marriage of wife, one-half of income for her and residue for Children, 750.

Subject to Annuities, Income for Maintenance of Grandchildren and remoter issue until Expiration of Lives and Twenty-one years; Capital among all Issue then living equally; Accumulation for twenty-one years from testator's death; In default of issue of testator, to issue of his father and mother, 750.

TRUSTS OF PERSONALTY—*continued.*

Appointment under settlement to Husband for Life; Capital to Children [except eldest son]; In default of children, to husband, 751.

One-half of income of a moiety for Wife of Improvident Son; Power to pay not more than a specified part of remaining income to son; Capital for son's issue, per stirpes; Other moiety for daughter and her issue; Cross-limitations; Maintenance and advancement, 752.

One-ninth of Income to each of Five Sons until twenty-five; then one-ninth of Capital to each son or his children, with Cross-limitations; Remaining shares to Three Daughters and a Son for Life, (subject to Forfeiture on Alienation), and Capital as each shall Appoint by will; In default of appointment, to their Children, 754.

As to Estate at —— and £——, to apply so much of Income and Capital as Trustees think fit for Benefit of Son; Accumulation of surplus; Power to apply income and capital for benefit of his wife and children; Ultimate trust for son's issue, per stirpes, subject to power of selection by will; General testamentary power in default of issue, 756.

For Son at twenty-one; Substitution of children; If no child, one-fourth to his Wife; Residue to Three Nieces and their Children, with Cross-limitations, and ultimate limitation to survivor, 757.

For Issue, if any; if no issue, one-third for Brother for Life, and then for his Children, subject to power of selection; Four-sixths of another third for Children of Deceased Brother for Lives, and then for their Children; Two other sixths for Children of Deceased Nieces; Cross-limitations; Remaining third for benefit of Lunatic Brother; and after his death any surplus for his Next of Kin, 757.

Residue of realty and personalty to be divided into as many parts as there are children; Two parts for Son and Daughter by Former Wife, Daughter's share Settled; Cross-limitations; The other parts for Wife absolutely, or if she be dead for children by her for life, and then for their issue, per stirpes, subject to power of selection; Cross-limitations; If wife survive and have no issue, one moiety to her and the other to issue by former wife, 761.

Realty and personalty for Widow and Issue per stirpes, in equal shares, 761.

Realty and personalty; £—— to be invested for Illegitimate Children; Substitution of issue and gift over on death under age without issue; Residue as Wife shall appoint; subject thereto, for her for life, and then for children, 763.

Realty to Wife for Life, then to be Sold; Proceeds for Children attaining twenty-one or leaving issue, 763.

For Children of a Living Person (whether tenant for life or not) attaining twenty-one or leaving issue, and the children of deceased children; Shares of girls for separate use, 764.

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For Brothers and Sisters by name in shares for their lives, and then for their issue, per stirpes, with cross-limitations, 765.

For Surviving Brothers and Sisters or their Issue for their Lives, then for their Issue, per stirpes, subject to power of relation, 766.

For Several Persons by Name at twenty-one or marriage, with substitution of children, 767.

For Several Persons by Name, and the Children of Deceased Persons, per stirpes, attaining twenty-one, or leaving issue; Substitution of children, 768.

GENERAL DIRECTIONS RESPECTING BEQUESTS, 768 *to* 781.

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Investment of minors' shares and legacies, &c.; Maintenance, 771.

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Time for Delivery and Payment of specific and pecuniary legacies, 773.

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Mortgage and trust estates to wife, with power of appointment, 781.

Mortgage and trust estates to trustees, with power of appointment, 781.

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Devise of estate held in trust for A. to Uses to Bar Dower in his favour; Other trust estates to son, 785.

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Appointment of Cestuis que trust under a money settlement, of which testator is trustee, to be Executors in respect of settled funds, 788.

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Freeholds and copyholds to A., with power of appointment, 789.

Freeholds to Uses to Prevent Dower; Proviso against lapse, 791.

Messuage to Wife for Life, she Repairing and Insuring, and then to son in fee, with power of appointment, 791.

Discretionary power to trustees to relinquish or complete a pending Contract of purchase, 793.

Freeholds to nephew in fee; to have the Purchase-money, if Sold, 793.

Legacy to trustees in lieu of estate, if Sold, 795.

Devise to cousin and her unmarried daughters successively, on Condition of Residence, 795.

To daughter in fee, with power of appointment, and trust for Separate Use, 795.

Fee-simple for Separate Use of married woman Inalienable during coverture, 796.

To nephew in fee, with power of appointment; Trustees to Manage and receive rents for Maintenance during minority; Substitutionary gift, 796.

Estate in mortgage, cum onere, except arrears of interest, 797.

Realty to trustees, with power of appointment, (subject to annuities), 797.

Realty (except copyholds) and personalty to trustees; Power of appointment over freeholds and copyholds; Trust for Widow during widowhood, she repairing, insuring, &c., and maintaining infant and unmarried children; Annuity to be on marriage; then for issue attaining twenty-one or leaving issue, per stirpes, 798.

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Advowson (to living of which testator is incumbent) in trust to present a person above sixty-five years of age, and then to sell, 801.

Realty to trustees, with power of appointment to pay Debts by sale or mortgage; Specific devise to Grandson at twenty-one or marriage; Substitution of his children; On failure of children, as to part, to two nephews with cross-limitations, the other part to be sold for benefit of children of sister living at grandson's decease, 802.

DEVISES OF REAL ESTATES—*continued.*

Six houses, with yard and pump, to A. in fee; Six adjoining houses, with Right of Way over yard and Use of Pump, to B. in fee; A. to covenant for Production of Title-deeds, 804.

Copyhold cottages to such uses as equitable mortgagee shall appoint; Subject thereto, (and to widow's right to reside in one, and to a weekly payment to her, recoverable by distress and entry, and to legacies to children recoverable by distress and entry), to son in fee, cum onere, with power of appointment; Power of sale given to mortgagee, 805.

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Trust for payment of debts not to exclude Statute of Limitations, 807.

Devise subject to Legacy and Interest, recoverable by Distress and Entry, 808.

Power to trustees to Appoint realty and raise Debts and Legacies by Sale or Mortgage, 808.

Power to raise Debts and Legacies by Mortgage; Provision as to Rent-charges, 809.

Charge of Debts on Specific Real estate and Personalty, pari passu, 810.

Specific devise subject to Legacy; Power of sale to legatee; Title-deeds to trustees in trust to allow legatee to prepare abstracts, &c., 810.

Devise of Incumbered Real estate, cum onere, to wife for life, and then to children; Discretionary powers to trustees to deal with Incumbrances; Power to Partition among devisees; Maintenance and advancement, 812.

If mortgagee of settled estate sells, trustees may receive and invest surplus proceeds, 814.

Mortgaged estates to be taken cum onere, 814.

Specific devise to son Charged with Legacies, (one given in trust); Power to raise legacies by Distress and Entry, 814.

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Power of appointment to trustees; Devise to Issue, per stirpes; Accruer on death under twenty-one without issue, 817.

Authority to Receive Rents for Maintenance, (*General form*), 818.

Specific lands to Brother for Life; remainder to his Children in fee, with cross-limitations, 818.

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Devises of Real Estates—*continued.*

Specific messuages for Residence of Wife and Children; then to be Sold for benefit of issue; Option to eldest son to purchase, 820.

Realty to Trustees, with Discretionary Power of Sale, and power to Partition among devisees, 820.

To Brother for Life; Remainder to his Children in common in Tail, with Cross-remainders; Leasing power, 821.

To Two in Common in Fee, with Cross-limitations on death under twenty-one without issue, 821.

To Several in Common in Fee, with Cross-limitations on death under twenty-one without issue, 821.

To Several in Common for Life; Remainder to Trustees for Sale for benefit of Surviving Issue of devisees for life, per stirpes; Investment; Maintenance, 822.

Gift over in case A. B. would become entitled, 823.

Devise of lands which may descend from brother, to uses of marriage settlement, 824.

Farm in trust for Three Sons for Life; Remainder for their Children, per stirpes; Cross-limitations in trust, 824.

Trust for Two Daughters for Life for separate and inalienable use; then for their Children; Specific devise to a grandson in fee; Maintenance; Leasing power, 825.

Dwelling-house, &c. to Wife for Life; Subject thereto, all real estate to Son in Fee, with power of appointment; Power to receive rents during minority for Maintenance, 826.

To nephew in fee; Powers of management, &c. during minority; Gift over on death under age, 828.

Strict settlement, (*Concise*); First and other Sons for lives, and their sons in tail male; Daughters concurrently for lives, and then sons in tail male; Sons and daughters concurrently in tail general; Tenants in Tail born in testator's lifetime made Tenants for Life: Maintenance; Accumulation; Payment of Mortgage debts; Power to charge Jointures and Portions, 828.

Strict settlement; Rent-charge to Wife; Further rent-charge during widowhood; Only Son for life; Remainder to his first and other sons in tail male; Remainder to other sons of testator and their issue in like manner; Remainder to sons of first son in tail general; Remainder to first and other daughters of first son in tail general; Remainder to sons and daughters successively of second and other sons; Remainder to testator's Daughter for life, then to her sons in tail male, then to her sons in tail general, then to her first and other daughters in tail general; Remainder to testator's second and other daughters, and their issue, &c.; Remainder to trustees in fee to raise £—— for daughters of niece; Maintenance and accumulation; Powers to limit Jointures and Portions; Power to Daughters to limit Life-estates or Rents to Husbands, 832.

DEVISES OF REAL ESTATES—*continued.*

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Freeholds to Son for Life; Remainder to his issue as he shall appoint, (but not so as to take transmissible interests before majority or marriage); In default of appointment, to Son's Children equally in fee; Clause of Accruer; Hotchpot; Maintenance; In default of issue of first son, to like uses for second son and his issue, 866.

Accumulation and Remote Vesting. Realty to trustees in fee to receive rents during numerous lives and twenty years; During twenty-one years to pay Annuities to Sons, (to cease on alienation), and Invest Surplus rents in purchase of realty; At expiration of twenty-one years to pay rents to persons who would be entitled in the order of a strict settlement to testator's first and other sons and their sons successively in tail male; At the end of the term to convey to person then being Testator's Heir Male, or heir in tail general, 869.

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Short power to Tenants for Life or in Tail, and Trustees during minorities, to grant husbandry [and mining, &c.] Leases, 877.

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Authority to trustees to appoint Bailiffs, &c., 888.

Tenants for life to Repair and Insure; Trustees, on default, may do so, and recover costs by distress and entry, 889.

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Leasehold in trust for Wife's Residence, and, subject thereto, for Sale, 993.

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ERRATA.

Page 174, *line* 17, *for* "Colt *v.* Sewell," *read* "Cole *v.* Sewell."
—— 529, *end of* 13*th line*, *insert* "before me or."
—— 531, *line* 11, *for* "sister," *read* "daughter."
—— 546, *line* 24, *after* "die," *insert* "before me or."
—— 782, *line* 15 *of note*, *for* "except," *read* "accept."
—— 817, *end of second paragraph*, *for* "(71 b^2)," *read* "(71 b^3."

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I.—1. Form of the instrument.

Ambulatory nature of wills.

A WILL is an instrument by which a person disposes of his property after his decease; until which event it is to remain ambulatory and inoperative. The latter quality forms the distinguishing characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposer, yet this result must be produced by the express terms, and cannot flow from the nature of the instrument. Thus, if a man should by deed limit lands to himself for life, with remainder to A. in fee, the effect upon the usufructuary enjoyment would be the same as if he made an immediate devise by will to A. in fee; and yet the case fully illustrates the distinction in question: for, in the former instance, A., *immediately* on the execution of the deed, becomes entitled to a remainder in fee; while, in the latter, he takes no interest whatever until the decease of the testator.

Form of wills.

The law has not required to the validity of a will that it should assume any particular form, or be expressed in testamentary language. It is only necessary that the instrument should disclose the

intentions of the deceased owner respecting the posthumous destination of his property.

Instruments in the form of deeds, agreements, &c., held to be testamentary.

A letter, *West's case*, Mo. 177, pl. 314; *Manly* v. *Lakin*, 1 Haggard, 130; *Re Dunn*, Id. 488; *Henderson* v. *Farbridge*, 1 Russ. 479, a deed-poll, and even an agreement or other instrument between parties, has repeatedly been held to have a testamentary operation, in regard at least to copyholds and personal estate; for, though the principle applies equally to devises of freeholds, its actual application to them has been considerably checked by the Statute of Frauds, which required an attestation by three witnesses; and these informal and irregular instruments were rarely, if ever, so attested, being in fact executed diverso intuitu. It may be proper to state in detail some of the leading cases of this class.

Instrument commenced as an indenture, but ending as a will.

Thus, in the case of *Hixon* or *Hickson* v. *Witham*, 1 Ch. Cas. 248, *S. C.* Finch, 195, where A., by indenture made between him of the one part, and B. and C. of the other part, in consideration of 5*l.*, bargained and sold to them certain lands in trust, to sell after his decease, and directed the money to arise by the sale to be employed in the payment of certain sums therein mentioned, and the rest thereof and all his personal estate he gave and bequeathed (for the language was here changed to the first person) in favour of certain persons. A. made B. and C. executors *of his will;* and signed, sealed, published, and declared the instrument as his will in the presence of several witnesses. The Court declared this to be a good will.

Instrument intitled "Articles of Agreement."

So, in the case of *Green* v. *Proude*, 3 Keb. 310, *S. C.* 1 Mod. 117, where, by an instrument, intitled "Articles of Agreement," made between A. of the one part, and B. of the other part, it was agreed between them that A., being sick in body, gives, &c.; in consideration whereof, B. promised to pay several sums of money. The instrument concluded in the ordinary manner of deeds, *i. e.* "in witness whereof the parties have hereunto interchangeably set their hands and seals." This instrument was delivered as a deed; but it was held to be testamentary, and as such revocable; and the Court seems to have been influenced by the circumstance that the person who prepared it was instructed to make a will.

Contemporaneous deed and will held to be testamentary.

Again, in the case of *Peacock* v. *Monk*, 1 Ves. sen. 127, where A., being about to settle his affairs, upon the same day made two instruments; one he called a deed, by way of agreement between him and B., and the other he called his will. By the deed, he put 4000*l.* into the hands of B., to pay to A. himself an annuity for life of 160*l.*, and afterwards to pay 1000*l.* a-piece to C. and D. if they survived him, and an annuity of 100*l.* to E. for life if she survived him, the

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residue to B. There was a proviso, that if the 160*l.* annuity was in arrear, B. should repay the 4000*l.* to A., to be placed out in the joint names of A. and B. (*a*). By the will, B. was appointed executor and made residuary legatee. Lord Hardwicke said, "B. being both executor in the will and contractor in the deed, and both instruments being executed at the same instant (as it must be taken, being on the same day), it speaks the whole to be a testamentary act. In several cases, the nearness of one act to another makes the Court take them as one; so that it is a testamentary act, though not strictly so, because not revocable" (*b*). [In this case, however, the question was not whether the instrument was a will, but simply whether it had one of the characteristics of a testamentary act, that of being *voluntary*, and therefore void against creditors under the 13th Eliz. c. 5.] The case of *Tomkyns* v. *Ladbroke*, 2 Ves. sen. 591, before the same Judge, was very similar in its circumstances. A., a freeman of London, two days before his death, executed a will and a deed, by the last of which he assigned 5000*l.*, part of his personal estate, to trustees, to the separate use of his daughter. Lord Hardwicke held that this was a testamentary act, and, as such, a fraud on the custom which allows a freeman to give away his personal estate by act in extremis, provided he divests himself of all property in it; but not if he reserved to himself a power over it. The case of *Hog* v. *Lashley*, decided by the House of Lords, 7th May, 1792, and stated 3 Hagg. 415, n., is confirmatory of the same principle; as an instrument, executed in the form of a Scotch settlement (for lands in Scotland are not disposable by will), but containing dispositions intended for the most part to take effect after the decease of the maker, was adjudged to be testamentary.

Instrument in the form of a deed-poll held to be testamentary.

Again, in the case of *Habergham* v. *Vincent*, 2 Ves. jun. 204, 4 B. C. C. 353, where A., by his will, duly executed and attested, devised his freehold and copyhold estates to certain uses, with remainder to such persons and for such estates as he by any deed or instrument in writing, to be executed by him and attested by two witnesses, should appoint. By an instrument executed on the following day, under the hand and seal of the testator, stamped and con-

(*a*) This clause shewed that the instrument was designed to operate in the donor's lifetime. In a much earlier case (*Audley's case*, 4 Leon. 166), it appears to have been considered as conclusive against the construing an instrument as a will, that by it an estate was to be taken by the maker, "who could not take by his own will."

(*b*) By this observation it should seem, that his Lordship thought that the instrument might be testamentary for some purposes, but not for others: a doctrine in which there seems insuperable difficulty. [The distinction now pointed out in the text will, perhaps, furnish an explanation of Lord Hardwicke's meaning.]

cluded like a deed, the testator recited this power in his will, and then proceeded thus—"Now know ye, that, by this my deed-poll, I do direct and appoint, that my trustees (naming them) shall, immediately after &c., convey to certain uses, &c." It was held, by Lord Loughborough, assisted by Mr. Justice Wilson and Mr. Justice Buller, that the second instrumeut was testamentary. Mr. Justice Buller said, that the cases had established that an instrument in any form, whether a deed-poll or indenture, if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. In one of the cases, there were express words of immediate grant, and a consideration to support it as a grant; but as, upon the whole, the intention was that it should have a future operation after his death, it was considered as a will.

Remark upon *Habergham* v. *Vincent*.

The consequence of holding the instrument in question to be a codicil, in this instance, was, that it operated upon the copyholds, but not upon the freeholds, not being attested by three witnesses; and the Court decided that it was not competent to a testator to reserve to himself, by his will, a power to dispose of freehold estates by an unattested codicil.

Property professedly settled by deed, held to be liable to the legacy duty.

Another case in which a question of this kind was discussed is, *Attorney-General* v. *Jones*, 3 Price, 368; where A., by indenture dated 25th March, 1813, assigned, for a nominal pecuniary consideration, certain leasehold property to C. and D.; also certain stock in the funds, with the dividends which should be due thereon at his decease, the arrears of any pension that might be due to him at his death, and his household furniture, &c., and all other his personal estate then belonging to him, or which should belong to him at his decease, upon trust for himself for life, and after his decease, for a daughter. The instrument reserved to A. a power of revocation by deed or will. By will, dated 16th April, 1813, A. confirmed the deed except as to certain particulars, which he specified, and appointed the same persons as were trustees in the deed executors. A. did not transfer the stock, or part with the possession of the assigned property, or even communicate to the trustees the existence of the deed. The question was, whether the property assigned by it was liable to the legacy duty; and the Court of Exchequer (Wood, B., diss.) decided in the affirmative, adverting to the circumstance that the consideration was nominal; the trust for the grantor not to receive the dividends merely, but implying a power in him to dispose of the property as he should think proper (*a*); that he kept the deed

(*a*) It was merely for the use and benefit of A. for life.

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in his own possession, never transferred the stock to the trustees, nor invested them with the control of the property, or even informed them of it; that, *though the legal estate was in the trustees*, the actual ownership remained with the grantor; that the deed professed to grant the property of which the maker should be possessed at the time of his decease, which, otherwise than as a will, it could not do; it contained a power of revocation by the most informal instruments; and, lastly, (on which great stress was laid), that the will, by referring to, and confirming the deed, "threw a testamentary character over the whole." Wood, B., in support of his contrary opinion, relied not only on the form of the instrument, which was perfect as a deed, but on its effect; which, he said, was to vest the legal estate in the leasehold property in the trustees instanter. *And was there*, he asked, *a case where the estate passed by a will in the lifetime of the testator?* He argued, that the confirmation of it in the subsequent will made no difference. "Suppose," said the learned Judge, "there had been no power of revocation, would it not have been valid as a deed?—and suppose, in that case, the party had made a will, disposing of the property differently, that will would not avail against a deed; but the deed, notwithstanding the alteration of the will, if he had not reserved the power, would prevail against the will. That shews it is a deed. If, on the other hand, he had made a will, and then another, the second would have been a revocation of the first."

Remark upon *Attorney-General* v. *Jones*.

This case has not been approved of by the profession, and the reasoning of the Court is far from being satisfactory. The argument founded on the power of revocation is singular, because such a power was not required if the instrument was testamentary, and could only operate in case the instrument, taking effect as a deed, was not revocable in its nature; and yet this argument so powerfully influenced Mr. Baron Graham, that he admitted, that if the instrument had not contained a power of revocation, he should have come to a different conclusion. But the observations on the case of *Attorney-General* v. *Jones*, and the important practical considerations it suggests, more properly find a place in the title "Settlements," in the framing of which it ought to be kept in view. [See Mr. Jarman's further observations on this case of *Attorney-General* v. *Jones*, in 1 Jarm. Wills, 17, 18.]

Case of *Tompson* v. *Browne*.

[In the case of *Tompson* v. *Browne*, 3 Myl. & K. 32, an instrument vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, was held not to be liable to the payment of legacy duty. In this case Sir C. C. Pepys, M.R., said: "The

decision in *The Attorney-General* v. *Jones* seems to have proceeded upon the ground, that, under the circumstances of that case, nothing passed from the maker of the instrument so as to entitle any other person to interfere with his property in his lifetime. If there be anything in that decision to support the notion, that where a person by deed settles property to his own use during his life, and after his decease for the benefit of other persons, a power of revocation reserved in such a deed alters the character of the instrument, and renders it testamentary, and consequently subject to legacy duty, I can only say that, if this were law, a great number of transactions of which the validity has never been doubted would be liable to be impeached."]

Case of *Sheldon* v. *Sheldon*.

[In the recent case of *Sheldon* v. *Sheldon*, 1 Robertson, 81, Dr. Lushington, sitting for Sir Herbert Jenner Fust, made the following observations on these two cases of *Attorney-General* v. *Jones* and *Tompson* v. *Browne* :—"In *The Attorney-General* v. *Jones*, a question arose, whether, under a deed made by a party disposing of property after his death, and which deed was subsequently confirmed by his will, any legacy duty was payable. The object of the deed was, in all probability, to avoid payment of the duty; it reserved a full power of disposition and revocation. The majority of the Court, looking to the contents of the instrument, thought it ought to be considered as of a testamentary nature, and that legacy duty was payable. I have always understood that this case has been disapproved of. In my judgment it is an erroneous decision, and for this plain and obvious reason,—the judges of the Exchequer had to look to a statute, in order to determine whether legacy duty was payable on a testamentary instrument, the statute making no legacy duty payable on a deed; and the Court of Exchequer took upon itself to say, that the instrument in question was testamentary, thereby adjudicating on a subject as to which that Court had no authority to decide, and which it was incompetent to decide. I think I can shew, by reference to another recited case, that the opinion of Lord Cottenham is decidedly against the judgment in *The Attorney-General* v. *Jones*. In *Tompson* v. *Browne* a question was raised by trustees, whether a settlement under which the plaintiff claimed was not of a testamentary nature, and consequently legacy duty payable. Upon looking at the case the point seems almost the same as that of *The Attorney-General* v. *Jones*. Lord Cottenham, then Master of the Rolls, decided that legacy duty was not payable, but did not enter into the question as to the instrument being of a testamentary nature. I think if that question had been put in more direct terms to Lord

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Cottenham, he would have done what all other judges have done, and would have repudiated all authority to determine what is or is not a testamentary instrument of personal property" (*a*). If this remark of Dr. Lushington was intended to imply, that the Master of the Rolls, in deciding the point in *Tompson* v. *Browne*, went beyond his jurisdiction, it seems to be erroneous. The rule is, that the Ecclesiastical Court alone can decide that an instrument is testamentary as regards personalty; but, of course, any court that has jurisdiction over instruments not testamentary, must have jurisdiction *for its own purposes*, to decide that a given instrument is within its own jurisdiction, *i. e.* is not testamentary.]

Rule in Ecclesiastical Courts as to instruments testamentary in substance but not in form.

The Ecclesiastical Courts (before which, of course, questions of this kind are most frequently agitated) act fully up to the principle of regarding an instrument as testamentary which is intended not to take effect until the maker's decease, though assuming the form of a disposition inter vivos; and more especially if it be incapable of operation in the intended form; and, accordingly, in repeated instances, the Prerogative Court has granted probate of the assignment of a bond by indorsement, *Musgrave* v. *Down*, T. T. 1784; receipts for stock and bills indorsed, *Sabine* v. *Goate & Church*, 1782; a letter, *Drybutter* v. *Hodges*, E. T. 1793; marriage articles, *Marnell* v. *Walton*, T. T. 1796; and promissory notes, and notes payable by executors, in order to avoid the legacy duty, *Maxee* v. *Shute*, H. T. 1799; severally cit. 2 Hagg. 247. And, on the authority of these cases, it was lately decided by Sir J. Nicholl, that the drafts of three bonds, prepared in the lifetime of the deceased, and intended to be executed by him to the trustees of the marriage settlements of his three daughters, in substitution for legacies which he had, by a revoked will, bequeathed for the benefit of the daughters, and the execution of which bonds was prevented by his death, were to be received as testamentary: *Masterman* v. *Maberly*, 2 Hagg. 235.

Instrument professing to be a deed of settlement held to be testamentary.

In a subsequent case, the facts shortly were, that, in 1819, A., and B. his wife, executed a deed, conveying property to trustees for the use of A. and B.; and, upon the death of the survivor, to pay over the property to different persons. A. survived his wife, and died without having exercised a power reserved to him of revoking the

(*a*) [A court of equity has no jurisdiction to determine on the validity of a will either of real or personal estates: *Jones* v. *Jones*, 3 Mer. 161; *Pemberton* v. *Pemberton*, 13 Ves. 297; *Jones* v. *Frost*, Jac. 466; the question of the validity of a will of personalty belonging to the ecclesiastical courts, that of the validity of a will of realty to the courts of common law. As to the conclusiveness of probate, see post, p. 13.]

trusts. Probate to the trustees was prayed, on the ground that the deed was, in its whole purport and effect, testamentary, not being to operate until after the death of A., and the Court decreed accordingly: *In re Knight*, 2 Hagg. 554.

Paper containing words of present gift held to be not testamentary.

But it should seem, that, if the instrument is not testamentary, either in form or in substance, none of the gifts in it being expressed in testamentary language, or in terms postponed to the death of the maker, and no collateral evidence is adduced to shew that it was intended as a will, probate will not be granted of it as such. Thus, where a minor (aged nineteen) wrote a paper in these words:—"I, A. B., of &c., in the presence of the two undermentioned witnesses, C. D., of &c., and E. F., of &c., do give all my goods and chattels to M. D., of ——, spinster." This paper was dated and witnessed by the two persons referred to in the body of it. The Court was of opinion, that, as the paper bore upon the face of it no evidence of its being intended to be testamentary; but it rather appeared, both from its contents, and the evidence dehors (though the latter was rather conflicting), to have been intended as a present gift, probate ought not to be granted: *King's Proctor* v. *Daines*, 3 Hagg. 218.

And in another instance probate was refused of a letter by the deceased to a friend, directing the sale of stock, and the distribution of the proceeds, on the ground that it referred to an immediate and not to a posthumous sale: *Glynn* v. *Oglander*, 2 Hagg. 428.

Case of *Sheldon* v. *Sheldon*.

[In the case already mentioned of *Sheldon* v. *Sheldon*, Dr. Lushington gave the following exposition of the principles and practice of the Ecclesiastical Courts, both before and since the passing of the present Statute of Wills, as to incorporating, in the probate of wills of personalty, papers not per se testamentary:—"Let us then look back to original principles. There is a well known and old established distinction between wills of real and personal estate, which throws some light on this subject. If the courts of law or equity wished to know what real property a testator had devised, and in what manner, they looked to the original instruments themselves. If they wished to be informed as to bequests of personal estate, they looked to the probate of those instruments, and never, as I believe, to any original. There is a case before Lord Cowper (*Plume* v. *Beale*, 1 P. Wms. 388), where a bill was filed, alleging that a legacy had been interlined in a will: he dismissed the bill, and said he could not look to anything but the probate. Hence the Ecclesiastical Courts, in the exercise of ecclesiastical jurisdiction, had always to determine what papers a probate should contain; all other courts

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were bound by that probate: they could not give effect to anything out of it, nor refuse or avoid to give effect to everything in it.]

Rules before 7 Will. 4 & 1 Vict. c. 26.

[" Before the passing of the present Statute of Wills, many well-known rules existed, and were in force on this subject. All papers, proved by parol evidence to be intended to be final after death, were admitted to probate, without any hinderance arising from shape or form. One of the reasons generally adduced for this was, that these documents would otherwise be void and of no effect. But the papers were admitted to probate not on that account alone, for it was only a circumstance in the case: they were admitted because they were to operate on personal property after death, and because they were proved to contain the final intentions of the deceased. All can recollect this being done on parol evidence only. If a paper was not in the deceased's handwriting, if it was proved by competent evidence, it was always admitted to probate, and if admitted on parol evidence only, à fortiori was it entitled to be admitted when sufficiently referred to in a paper in the deceased's own handwriting, of itself entitled to probate: for it proved the intention of the deceased in more solemn legal form. Very many papers so referred to, were therefore admitted into the probate.]

[" I own I was surprised at the argument that the title to probate depended on the validity or invalidity of the instrument referred to: because, where the reference was sufficient, the question of validity or invalidity never arose; the sufficiency of the reference was the sole point. In the case respecting Lord Keith's will, there was a reference to settled property, and all the deeds were incorporated in the probate; and I think, very recently, something of the same kind took place in this Court: *In the goods of Dickens, deceased,* (3 Curteis, 60). The general rule used to be, that all papers entitled to probate must be admitted into the probate, and, as papers referred to were legally entitled to probate, the practice was to prove them. But difficulties arose in carrying this rule into practice in all cases; one of such difficulties is alluded to in the case I have just mentioned. Frequently the document referred to was not in the custody of the parties, or the expense of engrossing it in the probate was an important matter. I remember perfectly well, when at the bar, finding myself on one occasion so pressed with these difficulties, that I privately communicated them to Sir John Nicholl, and he pronounced an opinion upon the subject, to the following effect:—he said, " He had taken all the circumstances into his consideration, and would relax the general rule, which compelled parties to insert in the pro-

bate everything which properly formed a part of it, where the expense of doing so was so very great;" but he held, at the same time, that the parties might, if they chose to do so, take probate of such papers; only, that they should not be compelled to do so: indeed, in some cases it is obvious it would not be practicable to do so; for this Court could not say, that, because a marriage settlement is recited in a will, the deed of settlement shall be taken out of the custody of parties properly entitled to it, and be brought into this court.]

["The result of this departure from the general rule, however unnecessary, was this, that inasmuch as courts of law and equity could only look to the probate, they could not allow papers entitled to probate, but left out of it, to have any legal effect. I am not, however, aware that any great inconvenience arose from this, except in one case, that of *Dillon* v. *Harris*, (4 Bligh, 342), and, singular to say, although the real difficulty was mentioned by one of the counsel, it never appears to have struck any one of the judges. Even had the difficulty been felt, the remedy was at hand; for the probate might have been amended by engrossing in it the document referred to. In the case alluded to a reference was made in a will to a certain document, but probate was not taken of it, (there was nothing in contest but personal estate, and that makes it the more singular), one of the counsel said—that probate might have been taken of this paper—but, instead of going back to the Ecclesiastical Court, there was a long argument as to the admissibility of the document as evidence, and it was held, that it was not competent to produce it.]

Effect of the stat. 7 Will. 4 & 1 Vict. c. 26.

["This was the state of things in law and practice prior to the present Statute of Wills, which has made most essential alterations in one respect. It is no longer allowed to declare by parol evidence any deed or paper to be part of a will; but it is still possible to incorporate into a duly executed will or codicil any written document then in existence: but it must be borne in mind, that this incorporation is totally different from declaring an instrument to be testamentary; the validity of the incorporation does not depend on parol evidence, (which is no longer permitted), but the paper to be incorporated is protected by exactly the same evidence as renders valid the instrument by which the incorporation is effected, namely, the signature of the testator, and the subscriptions of two witnesses.]

As to *title* to probate, and *necessity* for taking probate.

["Another consequence, of no small importance, flows from this statute, and more peculiarly applies to the allegation given in this case. With respect to the *title* or *right* of the paper to be incorporated, it in no degree depends upon whether it be void or valid per se.

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It is perfectly true, that where there is a totally independent instrument, no one would be compelled to take probate of that which is altogether valid in itself; but in my opinion, and I will presently state my reasons, that never could be the case with regard to papers incorporated by reference. The *title* to probate depends upon the clearness and sufficiency of the words of incorporation, the *necessity* of taking probate will depend upon the validity or invalidity of the instrument to be incorporated. For instance, if a man, by will or codicil, simply ratifies a deed valid per se, no one would be compelled to take probate of that deed, but the *title* to probate remains the same; if he ratifies an instrument inoperative or invalid per se, then the *title* and the *necessity* co-exist. If a party refers to a valid deed, and directs that his property shall be settled on similar trusts, then there is a *title* to probate, and, if there be litigation, there is also *necessity;* for I have yet to learn how a court of law could give effect to such will, unless the instrument referred to formed part of the probate.]

["In the present case, the first question is, whether there is any reasonable doubt as to the sufficiency of the words of incorporation; as to the identification there can be no doubt, the deed is described by its date, &c., and I think the words '*ratify and confirm*,' are sufficient to incorporate it with the will. I am of opinion, that, by '*ratifying and confirming*' the deed, the testator has shewn sufficiently his intention to make it a part of his will, for otherwise those words would be nullities."]

Jurisdiction.

Probate of will containing clause inserted under influence of fraudulent misrepresentation.

[In the recent case of *Allen* v. *M'Pherson*, before the House of Lords, 11 Jur. 785, where a testator, by false and fraudulent representations respecting the character of the plaintiff, was induced, by a clause in a codicil to his will, to revoke a bequest before made to the plaintiff, the result of such revocation being to benefit the party making the misrepresentations; and the Ecclesiastical Court granted probate of this codicil, though opposed by the plaintiff, refusing to allow any case to be gone into affecting merely a part of the codicil: it was held, that, under these circumstances, the Court of Chancery had no jurisdiction to declare the party, by whose means the revocation was obtained, a trustee for the plaintiff.]

[In another recent case, (*Payne* v. *Trappes*, 11 Jur. 854), where a testator having two wills by him bearing date respectively in 1837 and 1838, made a codicil in 1839, which he declared to be a codicil to the will of 1837, it was held by Sir H. Jenner Fust, that the codicil set up the will of 1837, in opposition to the will of 1838,

parol evidence not being admissible under 7 Will. 4 & 1 Vict. c. 26, s. 22, to shew that the testator actually intended to refer to the will of 1838.]

Probate, how far conclusive.

Here it may be observed, that the granting of probate, which is the act of the Ecclesiastical Court, is conclusive as to the testamentary character of the instrument in relation to personal estate, but not with respect to real estate, either copyhold or freehold; for though (as shewn in a subsequent section, vide post, V. 2) any instrument sufficient as a will of personalty was always adequate to the devise of copyhold estates; yet, in regard to all persons other than those who claim the personal estate, the proceeding of the Spiritual Court is res inter alios acta: *Hume* v. *Rundell*, 6 Madd. 331. And even with respect to personal estate, the granting probate of any paper has no other effect than to establish generally its claim to be received as testamentary, and it remains for the Temporal Courts (or the Spiritual Court in the exercise of a distinct branch of its jurisdiction), to determine the construction. The adjudication of these courts may, and often does, render the paper wholly nugatory. It may be found not to contain any intelligible disposition of the deceased's property, (see *Gawler* v. *Standerwick*, 2 Cox, 16), or to be in substance the same as another paper, of which probate has been granted, (see *Heming* v. *Clutterbuck*, 1 Bligh, New Ser. 479), [" or to be invalid according to the law of a foreign country which constituted the domicile of the maker at the time of his decease: *Thornton* v. *Curling*, 8 Sim. 310; in all which cases," observes Mr. Jarman, 1 Treat. Wills, 23, "the instrument so proved operates merely as an appointment of an executor who distributes the property as under an intestacy."] Where the paper of which probate is prayed professes to be an appointment under a power, the Prerogative Court applies to it the ordinary principles of testamentary law, without attempting, in that proceeding, to pronounce on its sufficiency as a due execution of the power under which it purports to be made: *Draper* v. *Hitch*, 1 Hagg. 674; see also *Stevens* v. *Bagwell*, 15 Ves. 139. [See 1 Jarm. Wills, 24, for some further observations and cases as to probate of testamentary appointments.]

Appointment.

The facility with which loose papers are proved in the Ecclesiastical Courts, has been sometimes complained of by Judges, on whom the task of expounding the testamentary jargon thus transmitted has devolved; (see *Matthews* v. *Warner*, 4 Ves. 208, 210); in all probability, it has been induced by the consideration that a leaning on this side is less injurious than an error on the opposite side, the effect

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of which would be to debar parties from the farther litigation of their rights under the contested instrument (*a*). [The effect of the recent act will be to check the admission of informal and irregular testamentary papers; by the exclusion of all which are not attested by two witnesses.]

BY WHAT LOCAL LAW REGULATED.

I.—2. By what local law wills are regulated.

Local law governing wills.

As the form of testamentary dispositions varies in different countries, the present seems to be the proper place for shewing by what local law wills are regulated.

Realty ruled by lex rei sitæ; personalty by lex domicilii.

A will of lands is generally governed by the lex loci rei sitæ. In short, the place where, and the language in which such a will is written, are wholly unimportant as affecting both its construction and the formalities of its execution. The locality of the lands alone is to be considered. Thus, a will made in Holland, and written in Dutch, must, in order to operate on lands in England, contain expressions, which, being translated into our language, would comprise and destinate the lands in question, and must be executed and attested in the same manner as if the will were made in England: *Bovey* v. *Smith*, 1 Vern. 85, 145; see also *Bowaman* v. *Reece*, Pre. Ch. 577; *Drummond* v. *Drummond*, 6 B. P. C. Toml. ed. 601; see *Brodie* v. *Barry*, 2 Ves. & Bea. 131; [*Coppin* v. *Coppin*, 2 P. Wms. 291; *Curtis* v. *Hutton*, 14 Ves. 537.] And of course lands in England, belonging to a British subject domiciled abroad dying intestate, will descend according to the English law. See *Doe* d. *Birtwhistle* v. *Vardill*, 5 Barn. & Cress. 438.

In regard to personalty, however, whether in the case of testacy or intestacy, the lex domicilii prevails (*b*). If a foreigner, therefore, is domiciled in England, his personal property, in case he died intestate, will be distributed according to the English law of succession; and any will he may have left, though made in his native country, must be construed according to the law of England: *Anstruther* v. *Chalmer*, 2 Sim. 1. And it is scarcely necessary to observe, that stock in the public funds, British or foreign, is undistinguishable in this respect from other personal property. See *In*

(*a*) As to the admissibility in evidence of paper-writings, not proved as testamentary, vide Doug. 707; 1 Cox, 1; 15 Ves. 153; 2 East, 548; 1 Russ. 266.

(*b*) This position respects only the devolution of the property, and not the court of administration, which, by our law, is regulated by the lex loci rei sitæ.

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re Ewin, 1 Cromp. & Jerv. 151 (*a*). And so, it is conceived, are even terms for years, as the distinction which prevailed in the civil law between moveable and immoveable property has given place in our law to the distinction between real and personal estate. [It must be borne in mind, however, that the distinction is not precisely co-extensive in the two systems of law. See 1 Jarm. Wills, 4, n. (*i*). In the note referred to Mr. Jarman infers from this circumstance that leaseholds for years belonging to the denomination of immoveable property, in a system of jurisprudence founded on the civil law, *according to that system*, are subject to the lex loci, and not to the lex domicilii; and therefore, that if an Englishman domiciled abroad dies possessed of such property, it will devolve according to the English law. But the property being in England, it is apprehended that the law of England must determine what part of the property is real and what part personal; and the owner of the property being abroad, the lex domicilii must then come in and determine the distribution of that part of the property which the lex loci has determined to be personal, which, if the lex loci be that of England, will of course include leaseholds for years.]

On the other hand, if a British subject becomes domiciled abroad, the law of the place which at his death constituted his domicile, will govern the distribution of his personal property in England, in case of intestacy; *Balfour* v. *Scott*, 6 B. P. C. Toml. ed. 550; *Bruce* v. *Bruce*, Id. 566; S. C. 2 Bos. & Pull. 299, n.; *Hog* v. *Lashley*, 6 B. P. C. Toml. ed. 577; *Bempde* v. *Johnson*, 3 Ves. 198 (*b*); *Somer-*

(*a*) In this case the question was, as to the liability of property to legacy duty, the discussion of which sometimes indirectly involves points as to domicile, alienage, &c. See as to legacy duty, ante, Vol. 9, p. 788.

(*b*) In this case, Lord Loughborough said: "The question of domicile primâ facie is much more a question of fact than of law. The actual place where a person is, is primâ facie, to a great many purposes, his domicile. You encounter that, if you shew it is either constrained, or from the necessity of his affairs, or transitory, that he is a sojourner, and you take from it all character of permanency. If, on the contrary, you shew that the place of his residence is the seat of his fortune; if the place of his birth, upon which I lay the least stress, but, if the place of his education, where he acquired all his early habits, friends, and connections, and all the links that attach him to society are found there; if you add to that, that he had no other fixed residence upon an establishment of his own, you answer the question."

Domicile is not lost by mere abandonment, it is not to be defeated animo only, but animo et facto, and necessarily remains until a subsequent domicile be acquired, unless the party die in itinere toward an intended domicile: Per Sir J. Leach, V. C., in *Munroe* v. *Douglas*, 5 Madd. 379.

It has been decided that a person does not change his domicile by going to India in the king's service; secùs, if he enters into the service of the East India Company: *Bruce* v. *Bruce*, 2 Bos. & Pull. 229. [In the recent case

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ville v. *Lord Somerville*, 5 Ves. 750; and will, if he left a will, determine the validity and regulate the construction of such will; of which, therefore, an English Court will not grant probate unless it be an effectual testamentary instrument, according to the law of the domicile: *Stanley* v. *Bernes*, 3 Haggard, 375. And, by parity of reasoning, the Court will grant probate of an instrument ascertained to be testamentary according to the law of the foreign domicile, though clearly invalid as an English will, as was lately done by the Prerogative Court, in the instance of the will of a married lady domiciled in Spain (*a*), on its being shewn that by the Spanish law a feme covert may, under certain limitations, dispose of her property by will as a feme sole: *Re De Vera Maraver*, 1 Hagg. 498.

Principle adopted by the Court in granting probate.

And it is the constant practice of the Court to grant probate of a will previously proved in India, without inquiring into the grounds of the Indian proceeding, though the bulk of the property of the deceased testator (whose domicile was in India) happens to be in England: *Re Read*, 1 Hagg. 474.

Remarks upon wills of Englishmen domiciled abroad.

The necessity of conforming in the testamentary act to the law of the domicile is a most important doctrine to the numerous British residents in foreign countries; and it appears from the case of *Stanley* v. *Bernes* that the circumstances of the will being English in language and form, and of its shewing that the testator contemplated returning to England (*b*), (but which intention he never executed), are insufficient to exclude the lex domicilii. If an Englishman, domiciled abroad, has real property in England, he ought to make two wills, one devising such property duly executed and attested according to the English law, and the other bequeathing, if permitted, the personalty conformably to the foreign law. Wills

of *Craigie* v. *Lewin*, 3 Curt. 435, it was decided, that the domicile of origin of a person who has, by employment in the military service of the East India Company, acquired a domicile in India, does not revive until the acquired domicile is *finally* abandoned.]

It has been made a question, whether, after the death of the father, children remaining under the care of the mother follow the domicile which she may acquire, or retain that which their father had at his death, until they are capable of gaining one by acts of their own. The weight of authority is in favour of the former; and, therefore, where an Englishman domiciled in Guernsey died there, and the widow came to and took up her residence in England, bringing her children with her, it was held that the succession to the personal property of two of her children, who afterwards died at an early age, was to be governed by the law of England, there being no ground to impute the removal to fraudulent intention: *Potinger* v. *Wightman*, 3 Mer. 67.

(*a*) The testatrix was a native of Spain; but this, it is conceived, was immaterial.

(*b*) As to the animus revertendi, see also *Bruce* v. *Bruce*, 2 Bos. & Pull. 299, n.

made under such circumstances require more than ordinary care, in order to exclude some perplexing questions involving the application to an uncertain extent of the conflicting principles respectively governing real and personal property. See *Brodie* v. *Barry*, 2 Ves. & Bea. 130.

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Similar questions may arise, and similar doctrines would apply in regard to the property of Englishmen domiciled in Scotland, and of Scotchmen domiciled in England, the law of succession and testamentary disposition being, in some respects, dissimilar in these two parts of the United Kingdom. Where an Englishmen or Scotchman divides his time equally between the two countries, the actual domicile is difficult to be ascertained, from the absence of preponderating evidence in favour of either. Such was the case of Lord Somerville, (5 Ves. 570), a Scotchman by birth and extraction, originally domiciled in Scotland, who took a house in London, and lived there half the year, the remainder of which he spent in Scotland, where he still had an establishment;—he died at his house in London. Sir R. P. Arden, after an elaborate argument, held, that the original domicile remained unchanged, and consequently the succession to the property of the deceased nobleman (who died intestate) was to be governed by the law of Scotland. The argument in favour of the English domicile was raised by the relations of the half blood, whom the law of Scotland excludes (*a*). Some increase of difficulty would occur in applying the principle where the deceased had no original domicile in either of the two countries, which, in his latter years, he alternately made his home. Such a case, however, is not likely to occur.

As to Scotland.

[In the case of *Brodie* v. *Barry*, 2 Ves. & B. 231, Sir William Grant thus stated two of the most remarkable cases involving the difficulties arising from a conflict between the law of England and that of Scotland—"Where land and personal property are situated in different countries, governed by different laws, and a question arises upon the combined effect of those laws, it is often very difficult to determine what portion of each law is to enter into the decision of the question. It is not easy to say how much is to be considered as depending on the law of real property, which must be taken from the country where the land lies; and how much upon the law of personal property, which must be taken from the country of the domi-

Conflict of English and Scotch law. Cases of *Balfour* v. *Scott* and *Drummond* v. *Drummond*.

(*a*) [This expression is calculated to convey a misleading idea of the law of Scotland, which only excludes relations by the mother, (brothers or sisters uterine), but admits relations by the father, (brothers or sisters consanguinean). And so far the rule is the same both as to heritage and moveables. See Ersk. Inst. Law of Scotland, B. III., tit. 8, 9.]

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cile, and to blend both together so as to form a rule applicable to the mixed question, which neither law separately furnishes sufficient materials to decide. I have argued, in the House of Lords, cases in which difficulties of that kind occurred. Two of the most remarkable were those of *Balfour* v. *Scott*, (stated in *Somerville* v. *Lord Somerville*, 5 Ves. 750; 6 Bro. P. C. 550 (ed. 1803)), and *Drummond* v. *Drummond*, 6 Bro. P. C. 601 (ed. 1803). In the former, a person domiciled in England died intestate, leaving real estate in Scotland. The heir was one of the next of kin, and claimed a share of the personal estate. To this claim it was objected, that, by the law of Scotland, the heir cannot share in the personal property with the other next of kin, except on condition of collating the real estate; that is, bringing it into a mass with the personal estate to form one common subject of division: Ersk. Inst. Law of Scotl. 701 (5th ed.) It was determined, however, that he was entitled to take his share without complying with that obligation. There the English law decided the question. In *Drummond* v. *Drummond*, a person domiciled in England had real estate in Scotland; upon which he granted an heritable bond, (as to the effect and nature of an heritable bond, see Bell's Comm. on Laws of Scotl. 206; Ersk. Inst. 194; and Hope's Minor Pract. 35), to secure a debt contracted in England. He died intestate; and the question was, by which of the estates this debt was to be borne? It was clear, that, by the English law, the personal estate was the primary fund for the payment of debts. It was equally clear, that, by the law of Scotland, the real estate was the primary fund for the payment of the heritable bond. Here was a direct conflictus legum. It was said for the heir, that the personal estate must be distributed according to the law of England, and must bear all the burthens to which it is by that law subject. On the other hand, it was said, that the real estate must go according to the law of Scotland, and bear all the burthens to which it is by that law subject. It was determined, that the law of Scotland should prevail; and that the real estate must bear the burthen.]

["In the first case, the disability of the heir did not follow him to England; and the personal estate was distributed as if both the domicile and the real estate had been in England. In the second, the disability to claim exoneration out of the personalty did follow him into England; and the personal estate was distributed as if both the domicile and real estate had been in Scotland."]

Analogy between a devise in Scotland and a devise of copyhold in England.

[In the same case of *Brodie* v. *Barry*, Sir William Grant noticed the analogy between a devise in Scotland and a devise of copyhold in England: the will operating as a declaration of the use of a previous

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surrender in the latter case; and, "in Scotland, if there be a conveyance previously executed according to the proper feudal forms, the party may by will declare the use and trust to which it shall enure." In the case before him, Sir William Grant decided, that an heir at law of heritable property in Scotland being a legatee of personal property in England must be put to his election.]

[The case of *Attorney-General* v. *Mill*, 3 Russ. 328, stated post, may be referred to as a striking example of a testator's intention being defeated by this conflict of laws, or rather by the ignorance of the testator and his legal advisers.]

[In the case of *Bempde* v. *Johnstone*, 3 Ves. 198, Lord Loughborough said: "The point has been established in the cases in the House of Lords, which, if it was quite new and open, always appeared to me to be susceptible of a great deal of argument: whether, in the case of a person dying intestate, having property in different places and subject to different laws, the law of each place should not obtain in the distribution of the property situated there. Many foreign lawyers have held that proposition. There was a time when the courts of Scotland certainly held so. The judgments in the House of Lords have taken a contrary course; that there can be but one law: they must fix the place of the domicile; and the law of that country where the domicile is, decides, wherever the property is situated. That I take to be fixed law now. The Court of Session has conformed to those decisions; according to which the courts of Great Britain, both of Scotland and England, are bound to act." Yet, so far back as 1750, Lord Hardwicke, in the case of *Thorne* v. *Watkins*, 2 Ves. sen. 35, where it was insisted for the defendant, that so much of the personal estate of William Watkins as should arise from the personal estate of Richard Watkins, who resided in Scotland and died there, should be distributable according to the law of Scotland, said, "This is a strange imagination, for which there is no ground, either from the nature of the property or the manner in which that property is to be recovered. * * * A subject of England residing here, and administration of his personal estate taken out here, with debts due to him or demands in the nature of choses in action in Scotland to be recovered by his administrator—whether that is to fall under a different rule of disposition from the rest of his personal estate. That never was thought of, and would create confusion. And this question relates not to the articles of union, which indeed preserve the laws of the different countries, the jurisdictions, forums, and tribunals of each country; but this question would be the same after as before the union of the two crowns, and

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would be the same on a question of this sort arising in France or Holland, whether to be distributable according to the laws of those countries or of England. The reason is, that all debts follow the person, not of the debtor, in respect of the right of property, but of the creditor to whom due." See also the case of *Pipon* v. *Pipon*, decided by the House of Lords, Ambl. 25; *S. C.* Ridgw. 165; 9 Mod. 431.]

Conflict of English and Foreign law.

[Down to a recent period, all the adjudged cases had been of persons, being British subjects, dying domiciled in some part of the British dominions, different parts of those dominions having different rules of distribution. Such were the cases of *Bruce* v. *Bruce*, cit. 5 Ves. 761; of Sir Charles Douglas, (*Ommaney* v. *Bingham*, cit. 5 Ves. 757); of *Balfour* v. *Scott*, cit. 5 Ves. 754, stated 2 Ves. & B. 131; of the Marquis of Annandale (*Bempde* v. *Johnstone*, 3 Ves. 198); and of Lord Somerville (*Somerville* v. *Lord Somerville*, 5 Ves. 750). But there was no adjudged case in which a will made in accordance with the English forms, by a British subject domiciled in a foreign country, had been refused probate; no case in which the property of a British subject, dying even intestate in a foreign country, had been held distributable according to the law of such foreign country. No case had gone further than to adopt the lex domicilii, when the domicile was in some part of the British dominions, and when it was a case as to the distribution of the effects, or the construction of the instrument, not as to the right to the representation or the validity of the will. (See the observations of Sir John Nicholl, in *Stanley* v. *Bernes*, 3 Hagg. 441; and in *Curling* v. *Thornton*, 2 Add. 15, 16.) In the case of *Curling* v. *Thornton*, 2 Add. 6, Sir J. Nicholl said, "it may be doubted whether a British subject is entitled so far 'exuere patriam,' as to select a foreign domicile in *complete* derogation of his British." And he held, in that case, a will made according to the English forms, by a British subject domiciled in France, to be valid, although the will disposed of the property in favour of an illegitimate child and its mother, to the exclusion of his wife and his legitimate child, which is not permitted by the French law. But Lord Eldon appears to have doubted whether the will in that case, which, though valid by the law of England, was invalid by the law of France, had any operation beyond appointing the executor. See *Thornton* v. *Curling*, 8 Sim. 310. In the later case of *Stanley* v. *Bernes*, 3 Hagg. 373, which was the case of a will and several codicils, made and executed according to the law of Portugal, and several codicils not made and executed according to the law of Portugal, where the testator was domiciled,

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Sir J. Nicholl pronounced for the will and codicils, and directed probate to be taken of them all. But so much of this sentence was reversed, on appeal, by the High Court of Delegates, as pronounced for the codicils not made and executed according to the lex domicilii, i. e. the law of Portugal: 3 Hagg. 465. See also the subsequent case of *Moore* v. *Darell and Budd*, 4 Hagg. 346, which was the case of a Spanish domicile. And in the case of *Price* v. *Dewhurst*, 4 Myl. & Cr. 76, Lord Cottenham, C., affirming the decision of the Vice-Chancellor (8 Sim. 279), said, "The law of the country in which the deceased was domiciled at the time of the death not only decides the course of distribution or succession as to personalty, but regulates the decision as to what constitutes the last will."]

Maltass v. *Maltass.* Law of wills respecting British subjects domiciled in Turkey.

[By the law of Turkey, no Turkish subject can make a will; but by treaty between Great Britain and the Ottoman empire, a British subject domiciled in Turkey may make a will. Probate of the will of an Englishman domiciled at Smyrna, made in the form of an English will, and dated the 22nd of October, 1841, but not executed and attested according to the 7 Will. 4 & 1 Vict. c. 26, was refused: *Maltass* v. *Maltass*, 3 Curt. 231. But when another will of the deceased, bearing date the 10th of June, 1834, was propounded, Dr. Lushington (sitting for Sir Herbert Jenner Fust) pronounced in favour of it: *Maltass* v. *Maltass*, Robertson, 67.]

Difficulty of defining *domicil.*

[As we have seen, the question of domicil has been stated to be much more a question of fact than of law; which may in part account for the failure of the numerous attempts to define the term *domicil.* In his judgment in the case of *Maltass* v. *Maltass*, Robertson, 67, Dr. Lushington, after stating the definition given by Judge Story, (see Story's Conflict of Laws, pp. 44, 47), thus proceeds:—"Even at this day, although so many powerful minds have been applied to the question, there is no universally-agreed definition of the word *domicil*—no agreed enumeration of the ingredients which constitute domicil. This is expressed in the following remarkable language by Hertius: 'Verum in iis definiendis mirum est quam sudant Doctores,' (1 Hert. Oper. s. 4, n. 3, p. 120, Edit. 1716). Indeed, I think there are no less than fourteen or fifteen different definitions of this word. The gradation from *residence* to *domicil* consists both of circumstances and intention; nice distinctions have and must prevail, such as cannot be defined beforehand. Hence, if the treaties did not apply to domicil, as residence would often become fused into domicil, British merchants, and, in case of their deaths, their families, would find themselves suddenly, and contrary to their intention, and to the presumption of intention, subject to a code of laws wholly

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contrary to their religious persuasions, their feelings, customs, and contemplation in making arrangements for the welfare of themselves and families; and, be it observed, the law of Turkey would come into operation (if residence became domicil), not only on property after death, but during life; and an individual might be living in Turkey out of the protection of any treaty. I know not what would be (if the case were capable of arising) the law of Turkey applicable to British merchants so domiciled, but certainly entire subjection to Turkish laws would be a grievous evil to British merchants of Christian belief, education, and habits. All these reasons appear to me to operate most strongly in favour of a liberal and extended construction of the treaties; in my opinion, the contracting parties never contemplated the anomaly which a contrary construction would lead to." On the subject of domicil, see Story's Conflict of Laws, 44—54, and the authorities there cited.]

Administration where there is a conflict of laws.

[The conflict of laws also frequently renders the question of administration an exceedingly complicated and difficult one. On this subject, as well as that of Succession and Distribution, the 12th and 13th chapters of Story's Conflict of Laws may be referred to; but in doing so, it is but justice to say, that that learned author's statements and conclusions must be received with caution. To give one example: at p. 721, 2nd ed., Judge Story thus states the decision of the Court in the case of *Anstruther* v. *Chalmers*: "The Court decided, that, being domiciled in England, *it was to be presumed that she intended* the law of England to be applied; *and that there was not enough in the will to repel that presumption*." The Vice-Chancellor in *Anstruther* v. *Chalmers*, 2 Sim. 1, said nothing about presumption of intention; he merely said, "Miss A. being domiciled in this country, the law of England must prevail." Sir John Nicholl, indeed, in *Stanley* v. *Bernes*, 3 Hagg. 444, has given this colour to the judgment of the Vice-Chancellor, but without ground. And Mr. J. Story, though he cites the case as from Simons, has copied the statement of it verbatim from the report of Sir J. Nicholl's judgment in *Stanley* v. *Bernes*, in Haggard.]

Where the will is duly executed according to the law of the country where the property (personal) is situated.

[A will of personalty not being valid unless executed in conformity with the law of the country where the testator is domiciled, the fact of the property bequeathed by such will being locally situate in another country, and of the will being duly executed according to the law of that country, will make no distinction: *Countess de Zichy Ferraris* v. *Marquis of Hertford*, 3 Curt. 468.]

II. Who may make wills.

The general (*a*) testamentary power over freehold lands (*b*) was originally given by the statute of 32 Hen. 8, c. 1, into the precise import of which it is now unnecessary to inquire, as it was quickly followed by the explanatory act of 34 & 35 Hen. 8, c. 5, which, after reciting the former statute, enacted, "That all and singular person and persons having a sole estate or interest in fee simple, or seised in fee simple, in coparcenary, or in common in fee simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of any rents or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise to any person or persons, (except bodies politic and corporate), by his last will and testament in writing, as much as in him of right is or shall be, all his said manors, lands, tenements, rents and hereditaments, or any of them, or any rents, commons, or other profits or commodities out of, or to be perceived out of the same, or out of any parcel thereof, at his own free will and pleasure."

Stat. 34 & 35 Hen. 8, c. 5.

Persons having an estate or interest in lands in fee enabled to devise.

By s. 14, it is provided, that wills or testaments made of any manors, &c., by any woman covert, or person within the age of twenty-one years, idiot, or by any person of nonsane memory, should not be taken to be good or effectual in law. This clause did not create any disability that was unknown, nor does it comprise all that were known to the common law, but seems to have been dictated by an apprehension that the general terms of the act of 32 Hen. 8, might have had the effect of removing pre-existing disabilities, according to the construction given to the nearly contemporary statute of jointures, 27 Hen. 8, c. 10. Hence, all the specified disqualifications extended equally to the bequeathing of personal estate, except that infants of a certain age, namely, males of fourteen, and females of twelve,

Exception as to femes coverts, infants, lunatics, and idiots.

Infants might under the old law bequeath personal estate.

(*a*) [By certain local customs (the custom of Kent, and some other parts of England, and in North Wales) lands and tenements were always disposable by will: but this was contrary to the general rule of the common law. See Burton on Real Property, 95; and Co. Litt. 111. b., and note (1). Coke says, with reference to the operation of the statutes of 32 and 34 Hen. 8, "But these statutes take not away the custome to devise, whereof Littleton speaketh: for though lands devisable by custome be holden by knight's service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole." And see note (4), as to the power by custom being sometimes larger than the statutory power, even since the stat. 12 Car. 2, c. 24.]

(*b*) Throughout the present dissertation the word "lands" is frequently used in a general sense, synonymously with real estate.

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might dispose by will of personalty: *Bishop* v. *Sharpe*, 2 Vern. 469; *Whitmore* v. *Wild*, 2 Ch. Rep. 382; *Hyde* v. *Hyde*, 2 Eq. Ca. Ab. 283, Pre. Ch. 366; and such a will was valid, notwithstanding that the testator or testatrix afterwards lived to majority without confirming it. *Hinckley* v. *Simmons*, 4 Ves. 160. On the other hand, infants of every age were, (as they still are) under an incompetency to aliene any portion of their property, real or personal, by deed. The effect produced by the ability to dispose in the one case, and the inability in the other, may be illustrated by the following supposititious case:—A., an infant, possessed of a leasehold for years, executed a deed granting an underlease to B., and afterwards died, during infancy, having, by his will made after the age of fourteen, bequeathed the property to C. The underlease would have been absolutely void against C., the legatee, though the will under which he claimed, was made during the very infancy which vitiated the underlease. [This incongruity is removed by the new law, which will be found stated at the end of this section.]

The disability of coverture differs essentially from those of infancy, idiocy, and lunacy. It does not arise from natural infirmity, but is the creature of civil policy, and may be dispensed with at the pleasure of the contracting or disposing parties, so far, at least, as the jus disponendi is concerned; while the contrary has been decided with respect to infancy, which alone, of the other enumerated disabilities, could admit of any argument being raised on the subject: *Hearle* v. *Greenbank*, 3 Atk. 695, 2 Ves. sen. 298.

Wife of an exile.

A woman, whose husband has been banished for life by act of Parliament, may dispose, by will, of her real and personal estate; for, as he is civilly defunct, she is restored to the rights and privileges of discoverture: *Countess of Portland* v. *Prodger*, 2 Vern. 104. And where a felon is transported for a definite term of years, his marital rights (and, therefore, it would seem his wife's conjugal disabilities) are suspended for that period. See *Ex parte Franks*, 1 Moore & Scott, 11.

Infants might devise by custom.

Infants might under the old law devise real estate by special custom, but it was necessary that the custom should prescribe some definite and reasonable age; for a custom, authorising the making of a will by persons too young to be capable of exercising a discretion, would be no less absurd than one which should empower lunatics or idiots to devise their property. Fourteen, it seems, would be considered a proper age: 2 Anders. 12.

Testamentary appointment of guardians

The disability of infancy was expressly taken away, in regard to the paternal appointment of testamentary guardians, by stat. 12 Car.

2, c. 24, s. 8; which enabled any father within the age of twenty-one, or of full age, who should leave any child under twenty-one, and not married, by deed or will, in the presence of two witnesses, to dispose of the custody of such child or children, during such time as he or they should continue under twenty-one, or any less time, to any person or persons other than popish recusants; and it gave to such person the custody of the infant's estate, both real and personal, and the same actions as guardians in socage. Vide ante, Vol. 2, p. 561.

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might be made by infants.

The guardianship draws after it the custody of the land which the infancy of the father would have prevented him from devising directly: *Bedell* v. *Constable*, Vaugh. 178; see also 2 P. W. 102; and it is observable, that though the power of appointing guardians does not extend to infant children who are married at the father's death, yet, if then unmarried, the guardianship is not afterwards determined by marriage: *Earl of Shaftesbury's case*, cit. 3 Atk. 625. The statute has been held not to interfere with the lord's right to the guardianship of his infant copyhold tenant: *Clench* v. *Cudmore*, 3 Lev. 395.

Wills of idiots and lunatics.

The will of an idiot is of course void: Dyer, 143 b. Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may of course destroy testamentary power: See Swinb. 133. The validity of a lunatic's will depends on the state of his mind at the time; for, if made during a lucid interval, it will be good: *Beverley's case*, 4 Rep. 123 b. [The general rule upon the subject of lunacy was thus stated in *White* v. *Wilson*, 13 Ves. 87, by Lord Eldon, (following Lord Thurlow's statement in *Att.-Gen.* v. *Parnther*, 3 Bro. C. C. 441): "Where the party has ever been subject to a commission, or to any restraint permitted by law, even a domestic restraint, clearly and plainly imposed upon him in consequence of undisputed insanity, the proof shewing sanity is thrown upon him: on the other hand, where insanity has not been imputed by relations or friends, or even by common fame, the proof of insanity, which does not appear to have ever existed, is thrown upon the other side; which is not to be made out by rambling through the whole life of the party, but must be applied to the particular date of the transaction. A deviation from that rule will produce great uncertainty."]

Rule on the subject of lunacy.

[General lunacy being established by an inquisition or other sufficient primâ facie evidence, the proof is thrown upon the party alleging a lucid interval; and he must establish that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind, sufficient to enable the party soundly to

Inquisition, how far evidence of testamentary incapacity.

Proof of a lucid interval thrown

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upon those seeking to establish the will.

judge of the act. "That is an inquiry," observed Sir William Grant, "much more fit for examination before a jury than upon written depositions." *Hall* v. *Warren,* 9 Ves. 605; see also *Att.-Gen.* v. *Parnther,* 3 Bro. C. C. 441; *Coglan's case,* cit. *Bootle* v. *Blundell,* 19 Ves. 508; *Cartwright* v. *Cartwright,* 1 Phil. 90; *Re Watts,* 1 Curt. 594. See also the observations of the Vice-Chancellor of England in the recent case of *Cooke* v. *Cholmondeley,* 11 Jur. 702, upon the will of Sir Gregory Osborne Page Turner, in granting an issue *Devisavit vel non.* In the course of his observations the Vice-Chancellor said: "This case appears to me to be in a most singular position; and I cannot recollect myself any case that at all seems to me to tally with it; for it has this most remarkable complexion, that, in the year 1814, a commission issued against Sir Gregory, and that was superseded in the year 1815, and in the year 1823 a second commission issued; and that lasted undisturbed, and without any attempt to disturb it, as I understand, until the time of his death, which, I think, was in March, 1843. It lasted, therefore, twenty years and a half and more, or thereabouts. It appears that the will in question was framed in the year 1841; and it appears that there were several interviews which Mr. Maberly (of whom I mean to speak with the greatest respect, as I have known him from his earliest youth) had with Sir Gregory Page Turner, preparatory to the final execution of the will; and they are stated at length in these depositions. They happened at several times, with considerable intervals; so that there was nothing like hurry. There was ample time given to Sir Gregory to understand, if, in point of law, he was capable of exercising an understanding, what it was that he really was doing. It appears that there were interviews on the 22nd and 29th April, on the 6th, the 13th, the 20th, and 27th May, and on the 2nd, and on the 15th days of June, 1841; and the will, as far as the form goes, was duly executed and attested on the 15th June. Well, now, with reference to the evidence that is given by Mr. Maberly, it really amounts to this: if you look to the answer to the third interrogatory, you will find this position of circumstances selected, namely, that submission to the existing commission is assumed to be an evidence of sanity; a desire to oppose it is assumed to be an evidence of insanity; and in proportion as the desire to oppose it subsided, it seems to have been considered, that, to that extent, there was a return of right understanding; and it is stated most distinctly, as evidence of returning understanding, that what Sir Gregory wished was not total freedom from the commission, but that he might be indulged with a carriage and with a little pocket-money, and that it

might be 'periodical,' I think the expression is, 'and that he might be at liberty to go about.' I can easily understand that there was a greater degree of tranquillity of mind, that, I think, is undisputed; but whether there was that perfect sanity which the law requires for the purpose of making a will, is a matter which I cannot but myself think ought further to be inquired into. It appears to me to be a fearful thing—a most fearful thing, that a commission shall be allowed to remain undisturbed for nearly twenty years; and that, in the course of that time, a dealing shall be had between the alleged lunatic and the person who knew him from his boyhood, as is stated upon Mr. Maberly's evidence with the greatest possible fairness, who himself was the solicitor to the commission, and who managed all the matters in which the lunatic was concerned under the commission, that such person should so deal with the lunatic as to obtain from him the execution of a will, and without any notice to the Great Seal, to the person who holds the custody of lunatics by grant from her Majesty; that he should, at the same time that he is procuring this most solemn evidence of sanity, allow knowingly and determinedly the commission to continue to subsist just as if the lunacy remained in full force. I cannot but myself think that it is a most important thing for the due administration of the affairs of mankind, that such a transaction should be thoroughly sifted."]

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[But the other branch of the subject, where the proof of insanity as regards the will, is thrown upon the party seeking to set aside the will, that insanity not having been established generally, is that which involves the points of the greatest difficulty. Some of the cases in this branch have been cases of persons who have been in the exercise of duties requiring considerable mental activity and energy, while their insanity quoad the will has nevertheless been sought to be established. In the case of *White* v. *Wilson*, 13 Ves. 87, where an heir-at-law failed to set aside a will on the suggestion of incompetency in the testator, the will being established upon clear evidence of capacity as to the conduct of the testator, particularly as a magistrate, acting as chairman at the quarter sessions, and in the House of Lords, opposed only by some circumstances of eccentricity and singularity in dress, Lord Eldon made the following statement, remarkable for compactness and perspicuity combined: "In my experience I know only one instance of a verdict of lunacy under such circumstances; which is the case of Mr. Greenwood, who was bred to the bar, and, as Lord Chedworth did, acted as chairman at the quarter sessions; but, becoming diseased, and receiving in a fever a draught from the hand of his brother, the delirium, taking

Where proof of insanity is thrown upon those seeking to set aside the will.

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its ground then, connected itself with that idea; and he considered his brother as having given him a potion, with a view to destroy him. He recovered in all other respects; but that morbid image never departed; and that idea appeared connected with the will, by which he disinherited his brother. Nevertheless, it was considered so necessary to have some precise rule, that though a verdict had been obtained in the Court of Common Pleas against the will, the Judge strongly advised the jury to find the other way; and they did accordingly find in favour of the will. Farther proceedings took place afterwards, and concluded in a compromise." *Greenwood's case* is also stated 3 Bro. C. C. 444; in the speech of Mr. Erskine, on the trial of James Hadfield, 27 Howell's State Trials, 1307, et seq.; and in the judgment of Sir John Nicholl in *Dew* v. *Clark*, 3 Addams, 96, 97.]

Case of *Dew* v. *Clark and Clark*.

[The remarkable case of *Dew* v. *Clark*, 3 Addams, 79; 1 Hagg. 311, cannot in strictness be considered as falling under either of the above-mentioned heads. In this case the testator, a Mr. Ely Stott, had conceived a stong and groundless aversion, exhibited in a series of acts of very great harshness and cruelty, towards an only child, to whom, though at the time of his death he was possessed of personal property to the amount of nearly 40,000*l.*, he left by his will a provision for life of about 100*l.* per annum; the principal stock out of which it was to accrue, not to go upon her death, to her issue, but to fall into the residuary estate bequeathed to his nephews. The testator had been admitted to practise as a surgeon. His practice, however, had been nearly confined to medical electricity, in which his patients were numerous, many of them persons of rank, and by which principally he had acquired his property. In the course of his long and elaborate judgment, which should be perused by all inquirers into this important subject, Sir John Nicholl thus distinguished the case before him from *Greenwood's case:* "The question in *Greenwood's case* was, whether that insane aversion which the deceased was admitted to have once felt towards his brother, had or had not subsided—was, or was not, in operation at the time when he made his will. Here the question is, whether that actual aversion, or antipathy, or call it what you will, which the deceased is admitted to have felt towards his daughter, and under the present impression of which he is hardly denied to have made this will, was either founded in, or ever had any connexion with insanity at all on his part? It is whether he, the deceased, at the time of making this will, had ever laboured under mental derangement; either on the subject of his daughter in particular, or, in fact, on any

subject? It is this which distinguishes the present case from that of Greenwood; and which constitutes at once the novelty and difficulty of the present case—the novelty and difficulty I mean in point of proof; for really, in point of general principle, I do not see that *Greenwood's case* and the present are distinguishable." But are there not other distinctions between this case and Greenwood's? Mr. Greenwood with the single exception of that one "morbid image" is stated to have been "*sound* and eminent in his practice at the bar; and in all respects a most useful and eminent member of society." Mr. Erskine's speech, cited 3 Addams, 95, n. (*b*). Now was Mr. Stott anything of this? He appears, indeed, to have succeeded in realising considerable property by that peculiar line of practice to which he devoted himself: but there is abundant evidence that the unsoundness of his mind was not confined to the irrational antipathy felt by him towards his daughter. See particularly 3 Addams, 182—191, and 194—200. Sir John Nicholl pronounced the will to be "null and void," as "being the very creature of that morbid delusion put into act and energy;" and this sentence was affirmed by the High Court of Delegates, 1 Hagg. 311. The parties against whom the decision was pronounced, petitioned the King in Council for a commission of review; the petition was referred to the Lord Chancellor, and according to the usual course, the case was again argued for several days very elaborately before Lord Lyndhurst, C., who, it not appearing to his Lordship that there was any error in law or any mistake as to fact, came to the conclusion that it was his duty to recommend his Majesty not to grant a commission of review: *Dew* v. *Clarke*, 5 Russ. 163. In the course of his judgment Lord Lyndhurst said, in reference to the observations of counsel with respect to the term *partial insanity* made use of by Sir John Nicholl: "I have read his judgment with great attention, and I collect from it that his meaning is this: that there must be unsoundness of mind in order to invalidate a will, but that the unsoundness may be evidenced in reference to one or more subjects. 5 Russ. 166."]

Persons deaf and blind.

A person who has been from his nativity blind, and deaf and dumb, (the dumbness being, in fact, a necessary consequence of the deafness), is intellectually incapable of making a will, as he wants those senses through which ideas are received into the mind. [See, however, the case of Laura Bridgeman, mentioned in the introduction to Archb. Whately's Treatise on Logic, s. 5.] Blindness or deafness alone, produces no such incapacity. Indeed, it has even been held that a will need not be read over to a blind testator, previously

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to its execution; *Longchamp* d. *Goodfellow* v. *Fish*, 2 Bos. & Pul. New Rep. 415; (vide ante, vol. 2, pp. 21, 22); though, it is almost superfluous to observe, that, in proportion as the infirmities of a testator expose him to deception, it becomes more imperatively the duty, and should be more anxiously the care, of all persons engaged in the transaction, to be prepared with unexceptionable proof that no imposition has been practised. The reader who wishes to acquaint himself with the circumstances of cases of this description, will find them numerously scattered through the ecclesiastical reports.

Subsequent confirmation of will originally void.

A will made during any personal disability, of course is not validated by the fact of the testator having outlived it, unless the removal of the disability were followed by some act of confirmation or adoption, amounting in law to a publication: 2 Salk. 238; 1 Eq. Ca. Ab. 171, pl. 3 (*a*). In the Ecclesiastical Court, the delivery by a widow of an instrument executed during coverture to the custody of another, as the will of the depositor, has been held to be a sufficient publication under the old law of a will of personal estate: *Miller* v. *Brown*, 2 Haggard, 209. [But whatever circumstances, either of form or of substance are necessary to the validity of an original will must of course be present and combined at the time, in order to set up a will originally invalid for any reason; and therefore, a will made during disability could not by re-publication merely, without re-execution and attestation, be set up so as to pass freeholds; and now no will originally invalid can be set up by any means short of execution and attestation.]

Devises by aliens.

A devise of lands by an alien is at least voidable, (see Shep. Touchst. 404), the crown being entitled, after office found, to seize them in the hands of the devisee, as it might have done in those of the alien, during his life. Until office, the lands of an alien remain in him, having all the qualities incidental to estates of that description. On which ground it has been held, that an alien tenant in tail in possession might suffer a common recovery, so as to bar the issue in tail and remainders; 4 Leon. 84; and, by parity of reasoning, the will of an alien will vest his defeasible title in a devisee; see Shep. Touchst. 404; though it is clear, that, if he dies intestate, the land will escheat to the king or other lord pro defectu tenentis, without any inquest of office; because an alien can have no heirs: Co. Lit. 2. b.

Devises by traitors and felons.

Persons attainted of high treason are clearly incompetent to devise their lands, since, by several old statutes, (vide ante, Vol. 4, p. 70),

(*a*) As to republication, vide post, Sect. vii.

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the real estates of the traitor are, by the attainder, ipso facto vested in the king. [But as there can be no forfeiture of freehold without attainder, *Rex* v. *Willes*, 3 B. & Ald. 514, and a felo de se is never attainted as a felon, he may devise his real estate; 3 Inst. 55.]

[A felo de se is, however, incapable of making a will of personal estate, for it is forfeited: 3 Inst. 55. The personal estate of traitors and felons also becomes forfeited on conviction and judgment recorded, and therefore they cannot make a will of such.]

The lands of persons attainted for petty treason and felony formerly escheated to the king or other feudal lord, by reason of the corruption of blood consequent on attainder, which of course prevented the descent to the heir; and the devises of such persons were absolutely void, or rather, by the better opinion, were voidable only, as in the case of an alien, Shep. Touchst. 404; and such is still the rule as to persons not entitled to the benefit of the stat. 54 Geo. 3, c. 145, stated ante, Vol. 4, p. 71; which has abolished the corruption of blood in all cases of attainder, except for high treason, petty treason, [by the stat. 9 Geo. 4, c. 31, s. 2, to be treated as murder,] and murder, or for counselling, procuring, and abetting those offences.

It is thought by some gentlemen, in opposition to the general opinion, that this statute enables persons convicted of any other than the excepted offences, to alien their real estate by will. The words are certainly large, but the Legislature could hardly have intended to leave in the offender the power of disposing of his lands, not only by will, but also by a conveyance inter vivos; for the concession of the one necessarily involves the concession of the other. The act seems to assume, though it does not declare, the felon to be civilly dead. See further, as to the law of escheat and forfeiture on conviction and attainder for felony, ante, Vol. 4, p. 70.

Wills of infants.

Appointment of guardians.

[By the 7th section of the statute 7 Will. 4 & 1 Vict. c. 26, it is enacted that no will made by any person under the age of twenty-one years shall be valid. Mr. Jarman remarks (1 Jarm. Wills, 36), that "the disability of infancy affects the testamentary powers under the new law no less universally than it does the power of disposition *by deed;* and, with respect to the appointment of guardians, is even more extensive; for" (besides that infants of the age of fifteen are, in certain cases, competent to convey gavelkind lands by feoffment) "the power of nominating guardians by deed given to an infant father by the statute of Charles seems to be still in force; and this will go far towards preventing any practical inconvenience, which might otherwise have resulted, from the abolition of the power of infant fathers to appoint guardians *by will.*"]

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III. What may be devised or bequeathed.

What may be devised or bequeathed.

Generally speaking, the testamentary power extends to all interests in real and personal estate, which at the decease of the testator would, if not thus disposed of, vest in his general real or personal representatives, whether the testator is the legal or beneficial owner only, or unites in himself both these characters. Tried by this rule, it is obvious that a devise by a joint tenant of real or personal estate is necessarily void in the event of the testator dying in the life-time of the co-tenant, whose title by survivorship takes precedence of the claim of the devisee or legatee, as it would of that of the heir or administrator of the testator in case he had died intestate: Co. Litt. 185. a. If, on the other hand, the testator survives his companion in the tenancy, the efficiency of the devise or bequest depends on the nature of the property; if it were a freehold interest, the estate devolving by survivorship would not pass by the will, the testator not having a sole or devisable estate when he made it; and, by parity of reasoning, any divided part or share which might after the will have been allotted to the testator on a partition of the property, would not pass thereby: *Swift* d. *Neale* v. *Roberts*, 1 W. Blackst. 476; 3 Burr. 1488. But this reasoning, it is obvious, does not apply to personal estate; a future interest in which devolving by survivorship, or acquired by partition, would, like all other after-acquired personalty, pass by a general or residuary bequest. [By the new law future interests of real estate may pass by wills made since 1837; 7 Will. 4 & 1 Vict. c. 26, s. 3.]

Joint estates not devisable.

Trust estates commonly held in joint tenancy.

The doctrine respecting joint tenancies comes under consideration in practice, most frequently in relation to trust estates, which are commonly vested jointly in a plurality of persons. The testacy or intestacy of any trustee who leaves a surviving co-trustee, it is unnecessary to inquire into; but, supposing him to have been sole trustee at his death, his will, if he left one, should be examined, in order to ascertain whether it contains a devise of trust estates, or one capable of operating on them (*a*). If the interest vested in the trustee were of a freehold nature, it would also be necessary [in the case of wills made before 1st January, 1838] to ascertain that the trust estate had vested in him solely by survivorship, or otherwise, when he made his will.

Executory interests, when devisable.

An executory interest in real or personal estate is disposable by will, if, from the nature of the contingency, the interest does not

(*a*) Vide post, Sect. xii, pl. 2.

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cease with the life of the testator, in other words, if it is descendible or transmissible. This doctrine was recognised in regard to real estate in the case of *Goodtitle* v. *Wood*, Willes, 211, cited 3 T. R. 94, and was finally established in the case of *Roe* d. *Perry* v. *Jones*, 1 H. Bl. 30; *S. C.* in B. R. 3 T. R. 88, where an estate was devised by will (on failure of limitations to the younger sons of A.) to the only son of A. in fee, in case he should have but one son who should live to attain twenty-one. A. had an only son, B., who, in the life-time of his father, after he had attained his majority, made a will, devising all his estate in possession or reversion, and died before his father; and the question was, whether this will operated to pass the executory use which B. had during his father's lifetime; and it was held that it did: Lord Kenyon distinguishing between such an interest and a mere possibility, like that which an heir has from his ancestor. Mr. Justice Buller observed, that if it was such an interest as was descendible, it was also devisable, as they must both be governed by the same principle. The converse of the proposition of the learned Judge is equally true; namely, that an interest which is not transmissible cannot be devised. An instance of this kind occurred in the case of *Doe* v. *Tomkinson*, 2 M. & S. 165, where a testator devised his real estate to A. and B., and the survivor of them, and to be disposed of by the survivor as she might, by will, devise. A. survived B., having in the life-time of B. made a will, devising her contingent interest; but which was held not to pass, on the ground that the person who was to take was not in any degree ascertainable before the contingency happened. The reasoning of the Court merely assigns a ground for the decision which is common to executory interests of every description, for it is the uncertainty who will become entitled that renders the interest contingent. The true ground it is submitted is, that the contingency, depending on survivorship, necessarily takes effect in the lifetime of the testator, and, therefore, cannot be the subject of a devise, which is inoperative until death; [for, under the old law, a will capable of passing a contingent estate, if it continued to be contingent until the testator's death, would not have passed a vested estate in the lands acquired by the happening of the contingency in his lifetime.] If this be the correct reason, it would follow that, in the case of a limitation to several persons, and the heirs of the one first dying, such an interest would be devisable, because it differs from the limitation in *Doe* v. *Tomkinson* in no other respect than in regard to the nature of the contingency, and yet the conclusion that such an interest may be disposed of by will, it is submitted, is indisputable. [The point cannot arise under a will

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made since 1837, it being enacted by the 3rd section of the stat. 1 Vict. c. 26, that the power conferred by it "shall extend to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested."]

Right of action.

A right of action was not devisable under the old law. Thus a reversion in fee expectant on an estate tail, which had been discontinued by the act of the tenant in tail, could not be devised: *Baker* v. *Hacking*, Cro. Car. 387, 408. This point was adverted to in the case of *Doe* d. *Cooper* v. *Finch*, 1 Nev. & Man. 130, the arguments in which enter largely into the discussion of some important general principles of law, and may be perused with advantage.

Rights of entry.

And the same doctrine was applicable to rights of entry. The point was much discussed in the case of *Goodright* v. *Forrester*, 8 East, 564, 1 Taunt. 587, where A. being tenant for life, with reversion to B. in fee, A. levied a fine come ceo, &c.; after which B. devised his reversion, and the validity of the devise of course depended on the doctrine in question. The case was eventually decided on another point, after an energetic protest from Sir J. Mansfield, C. J., against the doctrine affirming the invalidity of the devise; but which seems, by the better opinion, to be sound law. Such, it is evident, was the opinion of Eyre, C. J., in the case of *Cave* v. *Holford*, 3 Ves. 669; of Lord Eldon, in *Attorney-General* v. *Vigor*, 8 Ves. 282; and of the Court of King's Bench, in the subsequent case of *Doe* d. *Souter* v. *Hale*, 2 Dowl. & Ryl. 38: and Lord Eldon, moreover, intimated an opinion, that a will made during disseisin was invalid, though the testator died seised, which certainly appears to be more consistent with principle than the contrary doctrine advanced in *Bunker* v. *Cooke*, Salk. 237, on the ground that a disseisee, after re-entry, is by relation seised ab initio. [By stat. 7 Will. 4 & 1 Vict. c. 26, s. 3, the testamentary power is extended to "all right of entry from conditions broken, and other rights of entry."]

Conditions.

A condition was not devisable under the old law, the rule being that the heir alone could take advantage of a condition. By the effect of this doctrine, it should seem, a devise made by a mortgagor before the breach of the condition, i. e. before the non-payment of the mortgage-debt, was invalid at law, and the heir was entitled to tender the money, and avail himself of the benefit of the condition. See *Anon.*, 2 Ch. Cas. 8. But the doctrine did not apply where the proviso for redemption was framed, not in the form of a condition, but of an agreement to convey, which is now the more

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usual, and seems upon the whole to be the preferable, mode of framing it.

After-acquired freehold interests not devisable under the old law.

A will, disposing of a freehold interest in real estate, operated under the old law in the nature of a conveyance, and consequently extended only to hereditaments belonging to the testator when he made the devise. This rule was early established, in relation as well to devises by custom as to devises under the statutes of Henry 8, which shews that it did not arise from the penning of those statutes, but resulted from principles common to both species of devises. As equity follows the law, the doctrine extended no less to equitable than to legal interests. If, therefore, a testator, before the 1st of January, 1838, devised all the real estate of which he should be seised at the time of his decease, and after the making of his will he purchased lands in fee, such lands, whether they were conveyed to the testator himself, or to a trustee for him, did not pass by the will; but the legal inheritance in the former case, and the equitable inheritance in the latter, descended to the heir at law: *Bunker* v. *Cooke*, 1 Salk. 237; *S. C.* in Dom. Proc. 3 B. P. C. Toml. ed. 19; *Longford* v. *Pitt*, 2 P. W. 629.

Under the old law, expressions of present time refer to date of will.

[In regard to wills made before the year 1838, wherever a testator refers to an actually existing state of things, his language is construed to refer to the date of the will, and not to his death: 1 Jarm. Wills, 277. As to the construction of the words "now living," see the cases cited post, Sect. 14, pl. 3; and as to what expressions will comprise a term existing at the testator's death, see post, Sect. 6, pl. 3; and generally as to the period from which a will speaks, see Mr. Jarman's Treatise on Wills, vol 1, chap. x.]

Stat. 7 Will. 4 & 1 Vict. c. 26, s. 24.

Will to speak from the death, unless a contrary intention appear.

[By the 24th section of the statute 7 Will. 4 & 1 Vict. c. 26, it is enacted, "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, *unless a contrary intention shall appear by the will.*"]

On the construction of the whole will, the word "now," under the new law, held not to pass after-purchased real estate.

[In the recent case of *Cole* v. *Scott*, 12 Jur. 509, a devise (dated 8th April, 1843), of all freehold estates "whereof *I am now seised*," was held by the Vice-Chancellor of England, on the construction of the whole will, not to pass after-purchased real estate. It having been contended, that, in the case of *Doe* v. *Walker*, 12 Mee. & W. 591, the words "I am seised" were held to pass after-acquired property, His Honor observed:—"When you look at the words, you see the expression is not the same as in the case before the Court of Exchequer; but the words are 'I am now:' and the question is, first of all, whether the word 'now' of itself does not make the

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distinction between this case and the other case? And next, whether it is not plain, upon the construction which the testator himself has put upon the word 'now,' that by it he meant to speak of the estates and tenements which he had at the very day of making his will? In the first place, the words 'I am now' are distinguished from the words 'I am,' and, therefore, the decision of the Court of Exchequer is not applicable in terms to this case. But when you look at the subsequent clause, it seems to me the testator has, in effect, told us what he meant by the word 'now;' for he says, 'All &c., as well freehold as copyhold and leasehold, as are *now vested* in me, or, as to the said leasehold premises, shall be vested in me at the time of my death;' that is a construction by himself of the word 'now.' He means expressly to shew, that, in his opinion, the word 'now' did not pass future leaseholds; and, therefore, he says, 'as to the said leasehold premises, *shall be vested* in me.' Then, he says, 'To hold &c., subject to the like trusts as the same are now or shall be vested in me.' By the word 'now' he must mean the very day on which he was writing: it is the more remarkable, because, though he might devise the trust estates, he could not determine the trusts. He has put a construction himself upon the word 'now,' so as to give it the same effect as if he had said 'on this day' of making my will, and, therefore, the contrary intention mentioned in the statute must be held to be expressed."]

Devises by persons having equitable freehold.

Where a testator had only the equitable interest in the devised land when he made his will, and subsequently acquired the legal estate, the estate so acquired descended to the heir, and the equitable interest passed to the devisee, for whom the heir was a trustee. If, on the other hand, the testator were seised only of the legal estate at the time of the execution of his will, and afterwards acquired the equitable interest (as where, being a mortgagee in fee, he purchased the equity of redemption), the devisee was a trustee of the legal estate, which he derived through the will, for the heir-at-law, to whom the equitable inheritance descended: *Strode* v. *Lady Falkland*, 3 Ch. Rep. 188. Cases of the former description frequently occurred where a man contracted to purchase hereditaments in fee, then devised them, and, subsequently to the execution of his will, took a conveyance of the legal estate, and then died without re-publishing his will: *Greenhill* v. *Greenhill*, Pre. Ch. 320; *Green* v. *Smith*, 1 Atk. 572; *Gibson* v. *Lord Montfort*, 1 Ves. sen. 494; *Foley* v. *Percival*, 4 B. C. C. 420; *Capel* v. *Girdler*, 9 Ves. 509; *Holmes* v. *Barker*, 2 Madd. 462; the testator being equitable owner under the contract, his interest passed by the will to the devisee, whose equitable

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title the heir was bound to clothe with the legal estate. Notwithstanding this doctrine, however, it was always better to re-execute the will after the completion of a contract for purchase; not only for the purpose of avoiding the inconvenience attending the severance of the legal and equitable interests, aggravated possibly by the devolution of the former to an infant or a feme covert, but also because it frequently became questionable, whether the conveyance had not been framed in such a manner as to modify the equitable ownership, and thereby revoke the devise. The ordinary uses to prevent dower had this effect, if the terms of the contract were merely, that the estate should be conveyed to the purchaser in fee, without adding the usual words, "or to such other uses as he shall direct." (Vide post, Sect. 6.) [By the stat. 7 Will. 4 & 1 Vict. c. 26, s. 3, the testamentary power is extended to such real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.]

Effect where the testator dies pending a contract for purchase.

If the testator dies pending the completion of the contract, the devisee of the purchased land (or the heir if it is undevised) is entitled to call upon the executor or administrator to pay the purchase-money (if unpaid) out of the personal estate. The personal representative might repel this demand, by shewing that, from the defective state of the title or other circumstances, the contract was not obligatory on the deceased purchaser at the time of his death. If such were the fact, of course there would be no conversion, as between the real and personal representatives; and it would be begging the question to say, that the devisee or heir might elect to accept the title with its defects; for, unless the deceased purchaser was bound, his heir or devisee has derived from him no interest entitling him to any voice in the matter. It is equally clear, that the heir or devisee is not entitled to have the money laid out in the purchase of another estate: *Broome* v. *Monck*, 10 Ves. 597; see also *Attorney-General* v. *Day*, 1 Ves. sen. 218. But if the contract is abandoned, from circumstances arising subsequently to the purchaser's decease, as from his estate not affording the means of paying the purchase-money in time to hold the vendor to the contract, the devisee or heir is entitled to the money: *Whittaker* v. *Whittaker*, 4 B. C. C. 30. [In this case of *Whittaker* v. *Whittaker*, the decree, observed Lord Eldon, in *Broome* v. *Monck*, 10 Ves. 607, "decided only, first, that an individual shall not be held bound for an unreasonable time; and, secondly, if the party with whom he contracted died with the interest in equity in him, the effect of that decision should make

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no difference between his representatives real and personal; for he was vested with a complete demand, provided a good title could be made." And "as between the heir and the personal representatives, *Lacon* v. *Mertins*, 3 Atk. 1; *Buckmaster* v. *Harrop*, 7 Ves. 341, and other cases, establish the general principle, that whatever is the state of liability of the party himself to take at his death, must be the state of liability to be considered upon questions between those representing him after his death; and if at his death he could not be compelled to take, clearly the heir could not say to the executor, 'I will have the estate, and you shall pay for it.'" His lordship also observed (10 Ves. 619 and 615, 616), that it was "very difficult to maintain the doctrine in *Whittaker* v. *Whittaker*, which went beyond what was necessary for the decision," "as that the case of a devisee is to be distinguished from that of an heir; and that in the case of a devisee it is to be understood, that, the vendee having the estate at the time of the devise, in the sense in which he has it in equity," (that is, "conceiving himself seised of it in equity," 10 Ves. 616), "though it fails, because ultimately he cannot have it, yet such a devise is to be understood as a direction, not only that a devisee shall take, but that, if he cannot, the executors shall purchase another estate for that devisee:" 10 Ves. 615. As to what evidence of intention by devisor to accept the title may be necessary, and as to the question, where the deceased purchaser was bound, but the vendor was not, see 1 Jarm. Wills, 48, 49, 50; *Drant* v. *Vause*, 1 You. & Col. C. C. 580.] To prevent all questions of this nature, it would be well if a clause were always appended to a devise of lands contracted to be purchased, disposing of the money in the event of the contract not being carried into effect. It seldom happens that the testator intends his bounty to depend on any such contingency; consequently, the rule which makes the efficiency of the contract necessary to the validity of the devise defeats the intention. If the contract which the testator is alleged to have entered into be a parol contract, its operation in converting the property would depend upon the fact of its having been rendered enforceable by part-performance. See *Potter* v. *Potter*, 1 Ves. sen. 437. Supposing this fact to be established in favour of the real representative, a further question would, under the old law, arise between the heir and devisee, namely, whether the acts of part-performance, which rendered the contract binding, and in fact transferred the equitable ownership, took place before or after the making of the will—upon the result of which inquiry would depend whether the property passed by the devise or not; for, if the acts of part-performance were posterior, of course the interest ac-

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quired by the contract, not having belonged to the testator when he made his will, could not pass thereby. In this point of view it is conceived that the issue directed by Sir T. Plumer, M. R., in the case of *Burkett* v. *Randall*, 3 Mer. 466, "whether the testator was, at the time of his death, beneficially entitled to the premises in question," would have been more correct, so far as the devisee's interest was concerned, if the inquiry had related to the period of the making of the will instead of the death of the testator. [But now, since the stat. 7 Will. 4 & 1 Vict. c. 26, the point of time to which the inquiry relates must be the death of the testator, unless, indeed, the will contains very strong expressions confining its operation to the time of execution.]

As to devises of after-acquired copyholds.

Copyholds, equally with freeholds, were subject to the rule which restricted the operation of a devise to lands of which the testator was seised when he made his will: *Harris* v. *Cutler*, cit. 1 T. R. 438, n.; *Spring* v. *Biles*, Id. 435, n. A devise, therefore, of copyholds, however comprehensive in its terms, did not pass an after-acquired copyhold estate, except so far as its operation might happen to be enlarged by a subsequent surrender to the use of the will, which would have the effect of extending a general devise of copyholds to lands intermediately acquired: *Heylyn* v. *Heylyn*, Cowp. 130; *Attorney-General* v. *Vigor*, 8 Ves. 288. And it has been decided that a surrender to such uses as the testator "*shall*" by will appoint, applied to a will antecedently executed, it being considered that the surrenderor referred to that will which should be in existence at his death: *Spring* v. *Biles*, 1 T. R. 435, n.; overruling *Warde* v. *Warde*, Amb. 299, which is contra. Questions of this kind were less likely to arise since the statute of 55 Geo. 3, c. 192, (stated ante, Vol. 3, p. 533), rendered surrenders to the use of the will unnecessary to the validity of devises of copyholds, unless where required for some independent purpose, as the severance of a joint tenancy, the barring of an entail, or the extension of a devise of copyholds to intermediately acquired lands; [which last object, however, is now effected by the general provision of the stat. 7 Will. 4 & 1 Vict. c. 26, s. 3, by which the testamentary power is to extend to all copyholds, notwithstanding that the testator may not have surrendered the same to the use of his will.]

After-acquired copyholds pass as part of a manor.

And here it may be observed, that, as every copyhold is parcel of the manor to which it belongs, a devise of the manor passed such copyholds, though acquired by the lord after the making of his will: *Doe* d. *Hale* v. *Hogg*, 6 T. R. 708. Upon a principle somewhat analogous, it is clear that if a person having a remainder or reversion in

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fee, expectant on an estate for life, devised that remainder or reversion, and then by any means acquired, and by such acquisition extinguished, the estate for life, the devise carried the estate thus acquired, the merger of which merely had the effect of accelerating the ulterior estate.

Devise of the equitable interest in copyholds.

A person who has acquired an equitable interest in a copyhold estate by a contract for purchase, may of course devise that interest in the same manner as in the instance of freeholds: *Davie* v. *Beversham*, 3 Ch. Rep. 4; [*Phillips* v. *Phillips*, 1 Myl. & K. 649]; and it is wholly immaterial in any case, whether the contract was entered into by the testator in person, or by his authorised agent: *Greenhill* v. *Greenhill*, Prc. Ch. 320; *Earl of Bath* v. *Harvey*, Finch, 201.

Equitable interest under covenants to invest money in the purchase of real estate.

An equitable interest in real estate may be acquired not only under a covenant for the purchase of particular lands, but under a covenant to invest money in the purchase of lands (without particularising any), to be settled to uses. In such a case, any person who is to take a devisable estate under the limitations of the purchased lands, may devise the benefit of such covenant; and if he makes an express gift thereof, or devises generally all his lands, tenements, and hereditaments, or his real estate (which has been held to be sufficient), and a purchase is afterwards made pursuant to the covenant, the estate so acquired will be bound in equity by the devise: *Lingen* v. *Souray*, Pr. Ch. 400; 1 P. W. 172; *Guidot* v. *Guidot*, 3 Atk. 254; *Rashleigh* v. *Masters*, 3 B. C. C. 99; *Hickman* v. *Bacon*, 4 Id. 333; *Green* v. *Stephens*, 12 Ves. 419; *S. C.* 17 Ves. 64.

Devise by devisee or surrenderee of copyholds before admittance, void under the old law.

Under the old law, a devisee or surrenderee of copyholds before admittance could not devise: *Wainwright* v. *Elwell*, 1 Madd. 627.

The same rule was formerly considered to apply to an heir, whose situation, though certainly distinguishable in many important respects from that of a mere devisee, has been strangely confounded with it. It was supposed, however, that the case of *Smith* v. *Triggs*, 1 Stra. 487, had established the invalidity of a devise by an unadmitted heir; but that case, rightly understood, seems not to have warranted any such proposition; nevertheless, several judges had adverted to the case as an authority on this point. (See Sir T. Plumer's judgment in *Wainwright* v. *Elwell*, 1 Madd. 632; and Sir L. Shadwell's judgment in *King* v. *Turner*, 2 Sim. 548, reversed 1 Myl. & K. 456).

Devise by an unadmitted heir held to be good.

But the doctrine, notwithstanding this repeated recognition, was overruled by the case of *Right* d. *Taylor* v. *Banks*, 3 Barn. & Ad. 664, the facts of which were as follow:—On the 13th of February, 1781, John Taylor was admitted to the copyholds in question,

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which he afterwards surrendered to the use of his will, and then by his will devised part to his son Samuel (who was his heir-at-law) in fee, and part to his daughter Mary in fee: Mary Taylor, on the death of the testator, entered, but was never admitted; she died, leaving her brother Samuel her heir-at-law; Samuel Taylor, who, as heir-at-law of his father and sister, was entitled to the whole, (for the devise to him by the former did not break the descent, (vide post),) entered, but was never admitted. By his will he devised the copyholds in question, the validity of which devise was the point at issue. The Court held that the devise was good, relying much on the doctrine in Coke's Copyholder, sect. 41, that the heir is tenant immediately after the death of his ancestor, and may, before admittance, surrender into the hands of the lord; and also on *Brown's case*, 4 Rep. 22 b; *Brown* v. *Dyer*, 11 Mod. 73; *Morse* v. *Faulkener*, 1 Anst. 13; *Doe* v. *Tofield*, 11 East, 251; *Wilson* v. *Weddell*, Yelv. 145; which severally support the same doctrine, and were considered by Lord Tenterden and the rest of the Court to outweigh the recent dicta to the contrary, which were all founded on a mistaken view of the case of *Smith* v. *Triggs*. [The decision in *Right* d. *Taylor* v. *Banks* was confirmed by Lord Brougham, C., in *King* v. *Turner*, (on appeal), 1 Myl. & K. 456. And the point was again similarly determined in *Doe* d. *Perry* v. *Wilson*, 5 Ad. & El. 321. By the stat. 7 Will. 4 & 1 Vict. c. 26, s. 3, testamentary power is made to extend to an unadmitted heir, devisee, or surrenderee.]

Customary or tenant-right estates.

[Those customary estates of inheritance, known by the name of *customary tenant-right estates*, which were peculiar to the North of England, though alienable by deed and admittance thereon, and not holden at the will of the lord, were not devisable at law: *Doe* d. *Reay* v. *Huntington* (*a*), 4 East, 271; Co. Litt. 111. b. But, as

(*a*) [In this case Lord Ellenborough, C. J., said, it seemed now to be settled that these estates were not freehold, that "the freehold was in the lord;" and he cited the cases of *Stephenson* v. *Hall*, 3 Burr. 1278; and *Burrell* v. *Dodd*, 3 Bos. & Pull. 378. On the other hand, in the more recent case of *Bingham* v. *Wandgate*, 1 Russ. & Myl. 32, Sir J. Leach, M. R., said, "The custom of the manor requiring a bargain and sale, as well as a surrender and admittance, to pass the customary tenements, they are plainly freehold. The necessity of surrender and admittance is probably a remnant of the ancient tenure of villanage, and does not affect the freehold nature of the interest, although it prevents the customary tenement from being strictly of freehold tenure." Is there not some confusion here between interest or quantity of estate and tenure? Originally the interest, in other words, the duration or quantity of an estate, was so intimately connected with and dependant upon the nature of the tenure, that an estate could not in any sense be said to be freehold in the nature of the interest, which was held by a servile tenure.

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they were alienable by bargain and sale and admittance thereon, they might be devised in equity by a conveyance to trustees upon trusts

Strictly, indeed, the question of freehold or not freehold is a question of tenure solely, and not of interest. This seems to be the correct result of the old cases, (see the cases cited Bisset on Estates for Life, 11, 12, 13). In this view, it is apprehended, that, in estates not originally of a *free* tenure, the question of freehold could never properly arise, unless the nature of the tenure were changed by law. No quantity of interest could confer upon such estates the character of freehold, the difference being in kind, not in degree. In estates of a free tenure, on the other hand, the quantity or duration of the interest has made a line of distinction, dividing such estates into the two general classes of freehold, and less than freehold, the smallest of the sub-classes of the former class being estates for life. Perhaps the learned judge's meaning was, that the fact of a bargain and sale being necessary, in addition to surrender and admittance, exempted the tenure from the character of villenage. The recent case of *Busher*, App., *Thompson*, Resp., 4 C. B. R. 48, exhibits a very peculiar custom existing within the limits of the ancient borough of *Kirkby-in-Kendal*, in the county of Westmoreland. In that case, A. claimed to vote in respect of a burgage tenement in that borough. The case found, that burgage tenements within the borough had always been conveyed by deed of grant, or bargain and sale, without livery of seisin, and without a lease for a year, or any inrolment; that no surrender or admittance was required, nor was any fine paid upon descent or alienation; that the mode of descent was agreeably to the common law, except that females inherited, not as coparceners, but by seniority; that the interest of a feme covert was passed without any separate examination of the wife; that the widow of a person dying seised of a burgage tenement had the whole during her chaste viduity; that burgage tenements had always been devisable in the same way as ordinary freeholds; that they were held subject only to the payment of certain fixed annual rents, payable to some individual, and that no other services had been performed or payments made in respect of them: it was held by the Court of Common Pleas, that, in the absence of evidence to shew that the freehold was in any other person, it must be assumed that A. had such a freehold tenure as to entitle him to be registered, the value being sufficient. See also *Rex* v. *Ingleton*, 4 Jurist, 700; *Busher* v. *Thompson*, 11 Jur. 45.]

[In the recent case of *Doe* d. *Dand* v. *Thompson*, 7 Q. B. R. 897, where a special case stated, that, before the stat. 7 Will. 4 & 1 Vict. c. 26, there was no instance of a devise made of the legal estate of any messuages, lands, or tenements in the manor; but it had frequently occurred, that a tenant, wishing to dispose of his customary estate after death, conveyed by deed of customary conveyance, and surrendered to a trustee as on an ordinary alienation, the trusts of the equitable estate being then declared by a separate instrument, and being usually for the alienor during his life, and after his death to convey to such person as he should by deed or will appoint; but there was no instance of a devise of any customary tenement in the manor without such previous conveyance, surrender, and declaration of trust; it was held by the Court of Queen's Bench, that a custom not to pass estates by devise, or to pass them by some substituted method, was not shewn clearly enough to supersede the ordinary right of a copyholder to devise his lands; and, therefore, that a devise of such lands without surrender to the use of the will (before 7 Will. 4 & 1 Vict. c. 26) was sustained by sect. 1 of stat. 55 Geo. 3, c. 129, and not excluded from its operation by the latter clause of sect. 3. In reference to the opinion reported to have been expressed by Lord Thurlow in the case of

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to be declared by will: *Willan* v. *Lancaster*, 3 Russ. 108. By the recent act, 7 Will. 4 & 1 Vict. c. 26, s. 3, the power of testamentary disposition extends "to all real estate of the nature of customary freehold or tenant right."]

Bequests of chattel interests in lands.

Bequests of chattel interests in hereditaments are governed by principles wholly different from those which have been just observed upon. They do not, like freehold interests, pass directly to the legatee as the alienee of the testator, but, forming part of his personal estate, they devolve to the executor or other general personal representative, subject to the obligation of giving effect to any bequest in the will, specific or residuary, comprising the property in question: and the inquiry whether the testator was, at the time of making the will, possessed of a term of years, which he has bequeathed, would be no less unnecessary for the purpose of establishing the disposing power of the testator over the property, than the inquiry whether he was possessed of a horse or other personal chattel, which by his will he has professed to give. See *Wind* v. *Jekyl*, 1 P. W. 575; see also *James* v. *Dean*, 11 Ves. 388.

Freeholds pur autre vie.

A freehold pur autre vie, unlike all other estates, may be rendered transmissible either to real or personal representatives, according to the quality impressed upon it by the instrument creating the estate, or rather the instrument vesting it in the deceased owner, or in the person under whom he derived his title by act of law; for it now seems to be admitted that the devolution of the estate is governed by the words of limitation contained in the last conveyance, without regard to the terms of its original creation. Estates pur autre vie are devisable by the express terms of the statute of frauds, 29 Car. 2, c. 3, s. 12; the statute of the 32 Hen. 8 (ante, p. 23), being confined, according to the prevalent and probably the better opinion, to estates of inheritance: *Anonymous*, Cart. 211. Though the statute of frauds required three witnesses for the devise of an estate pur autre vie, yet it has been long settled, that where the property is limited otherwise than to the heirs of the owner, it is distributable as part of his personal estate, whether he died testate

Pike v. *White*, 3 Bro. C. C. 286, (see also Mr. Belt's note (3), p. 288), and that of the Court of Exchequer in *Doe* d. *Edmunds* v. *Llewellin*, 2 Cro., M., & R. 503; *S. C.* 5 Tyr. 899, Lord Denman, C. J., in delivering the judgment of the Court said:—"The only bearing of Lord Thurlow's short judgment in *Pike* v. *White*, on this case is, as it shews, the clear, strong impression on that great judge's mind of the all but universal devisability of copyhold land by surrender to the use of the will; and to this extent do we agree with the Court of Exchequer in *Doe* d. *Edmunds* v. *Llewellin*, that it is not to be questioned."]

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or intestate, an executor being held a trustee for those to whom the testator has given the personal estate by a will sufficient to pass personal estate: *Ripley* v. *Waterworth*, 7 Ves. 425. [By the 3rd section of the statute 7 Will. 4 & 1 Vict. c. 26, it is enacted, "that it shall be lawful for every person to devise, &c., all real estate and all personal estate which he shall be entitled to, either at law or in equity, and which if not so devised, &c., would devolve upon the *heir-at-law*, or customary heir of him; or if he became entitled by descent of his ancestor, or upon his executor or administrator; and that the powers hereby given shall extend" (inter alia) "to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament." This enactment does not in terms, nor, it is conceived, in construction, extend to estates pur autre vie, descendible to the heir special; for though the words "special occupant," standing unexplained, would include an occupant quasi in tail, their meaning is qualified by the general enactment at the commencement of the section. As the stat. 29 Car. 2, c. 3, s. 12, is not repealed "so far as it relates to any wills or estates pur autre vie to which the stat. 7 Will. 4 & 1 Vict. c. 26, does not extend," (an exception which, it is conceived, is to be taken distributively), the recent act does not appear to affect the question (perhaps the only one which was open to controversy, in regard to the devising power over estates of this description), whether, where they were limited to the tenant pur autre vie, *and the heirs of his body*, they could be devised without some act on his part to bar the entail.] It was admitted on all hands that an alienation by deed was an effectual bar; but the doubt was, whether the estate was devisable by will alone, without any such previous alienation. The authorities on the point are few and contradictory, the opinion to which Lord Kenyon inclined in *Doe* v. *Luxton*, 6 T. R. 293, in favour of the devise, being in direct opposition to that of Lord Redesdale in the case of *Campbell* v. *Sandys*, 1 Sch. & Lef. 294; and the decision of Lord Manners, in the case of *Dillon* v. *Dillon*, 2 Ball & Beatty, 77, who held that a quasi tenant in tail of an estate pur autre vie could not by devise exclude the title of the remainderman. In a former publication, (1 Pow. Dev. 41), the Editor treated the point as settled by the latter class of authorities, and such was evidently the impression of Sir T. Plumer, in the case of *Blake* v. *Luxton*, Coop. 185; but many gentlemen, to whose opinions deference is due, thought that these cases did not so pre-

Devise by quasi tenant in tail of estates pur autre vie.

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ponderate as to preclude the fair discussion of the subject. Upon principle, certainly, there seemed to be some difficulty in maintaining the distinction between the effect of an alienation by deed and by will. Any demonstration of the intention of the quasi owner in tail, whether by one mode or the other, that the estate shall go into a new channel or course of devolution, would seem to be sufficient for the purpose. If the more recent authorities against the devising power are not acquiesced in, probably the point will ere long be again agitated; but it rarely occurs in practice, and ought invariably to be prevented from occurring, by procuring testators who wish to dispose of property of this description, first to bar the quasi entail and remainders by deed. [As to which, see *Allen* v. *Allen,* 2 Dru. & W. 307; *Slade* v. *Pattison,* 14 Law J., Ch., 56.]

IV. To whom devises or bequests may be made.

WHO MAY BE DEVISEES.

Devises to corporations.

The enactment in the statute of wills (34 Hen. 8) forbade the devise of lands to bodies politic and corporate; and therefore a devise to a corporation, whether aggregate or sole, either for its own benefit or as trustee, was void, and the lands descended to the heir, either beneficially or charged with the trust, as the case might be: *Sonley* v. *Clockmakers' Company,* 1 B. C. C. 81. [The statute of 34 Hen. 8 was repealed by the recent act (7 Will. 4 & 1 Vict. c. 26); but the disability of corporations to take real estate by devise was not thereby removed, for that disability was created by various earlier statutes: (see 1 Jarm. Wills, 57). By the 7 & 8 Will. 3, c. 37, the crown was empowered to grant licenses to alien or take in mortmain of whomsoever the tenements shall be holden. A devise upon trust to a corporation, not licensed, or not empowered by act of Parliament or charter, to take lands in mortmain, is void at law, and the estate descends to the heir, charged with the trust.] It should be observed, however, that devises to corporations are authorised by some particular acts of Parliament. For instance, the statute of 43 Eliz. c. 4, was held to render valid appointments to corporations for charitable uses: *Flood's case,* Hobart, 136: and though devises to such uses are now prevented by the act of 9 Geo. 2, c. 36, yet the 4th section of the latter statute, excepting out of its operation gifts to the colleges in the two English universities, and the colleges of Eton, Winchester, and Westminster, seems to have had, so far as it goes, the same effect of conferring validity on devises to those corporations. So the stat. 43 Geo. 3, c. 107, enables persons to

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devise lands to the governors of Queen Anne's Bounty; and the stat. 43 Geo. 3, c. 108, authorises, under certain limitations, the devise of lands for the erection or repair of churches or chapels, the enlargement of churchyards or of the residence or glebe for any minister of the Church of England. [For similar enactments in favour of other charity corporations, see Shelford on Charitable Uses, who appears to have omitted the act incorporating the Church-Building Society, 9 Geo. 4, c. 42.]

Devises to aliens.

Alienage cannot, strictly speaking, be ranked among the incapacities to take by devise, as the devised hereditaments remain in the alien till office found, when they belong to the crown: *Duplessis* v. *Attorney-General*, 1 B. P. C. Toml. ed. 415. On this principle, where lands are devised to an alien and a British subject, as joint tenants, the whole does not vest in the latter (which would be the effect if the devise to the alien were absolutely void), but in both jointly; and if the crown does not seise the alien's moiety (as it might do after office found, *The King* v. *Boys*, Dy. 283 b), on the decease of the alien, leaving his co-devisee surviving, the survivorship, which is incident to every joint tenancy, takes place, subject, nevertheless, to be overreached by the crown's right of seizure, after office; which would, by relation, defeat the title of the surviving joint tenant to the alien's moiety: *Forset's case*, cit. 1 Leon. 47; 4 Leon. 82. If, however, the alien survives his co-devisee, it has been thought that the entirety will not devolve to him, as he is disabled from taking by operation of law, even for the benefit of the crown, since the law, by its own act, never gives an estate to one whom it does not permit to retain it. See *Collingwood* v. *Pace*, 1 Vent. 417. [But as each joint-tenant is seised of the entirety even during his co-tenant's life, it seems that he does not need to take anything by act of law when his co-tenant dies.] Where a trust in lands is created for an alien, by will or otherwise, the crown, it seems, upon office found, will be entitled to the benefit of it. See *Holland's case*, cit. 3 Ch. Rep. 35. The disabilities of alienage may be removed, partly, by a grant of letters of denization from the Crown, or wholly, by an act of Parliament investing the alien with the rights and privileges of a British subject. [A denizen may hold lands which he acquires by act of the party, and even those which devolve to him by act of law, except that he cannot claim by descent from or through his father, if an alien. See 1 Jarm. Wills, 62. In the case of *Fourdrin* v. *Gowdey*, 3 Myl. & K. 383, it was held by the Master of the Rolls, that letters of denization might be so expressed as to have a retrospective operation, enabling the grantee to

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hold and to devise lands antecedently acquired. Vide, ante, Vol. 1, p. 152.] A naturalised person, of course, may hold both the lands which he acquires by act of the party and those which devolve to him by act of law.

Acts of naturalisation have not a retrospective operation.

But an act of naturalisation will not render valid the antecedent conveyances of the alien. And, therefore, where lands were devised to an alien in trust for sale, who, after making sales and conveyances of parts of the estate in execution of his trust, was naturalised by act of Parliament, it was held, that the act did not validate the titles of the purchasers: *Fish* v. *Klein*, 2 Mer. 431. The ordinary form of the acts of naturalisation is, that the alien "shall be and is hereby *from henceforth* naturalised, and shall be, to all intents and purposes, reputed and taken to be, in every condition, respect, and degree, as if he had been a natural born subject within the United Kingdom; and shall be, and is hereby enabled &c. to inherit and be inheritable, and to ask, take, retain, have, keep, and enjoy all or any manors," &c. The act has not a retrospective operation, and the practice of Parliament will not permit it to be framed otherwise than in the present form. To establish derivative titles, therefore, an express act, or a grant from the crown, is requisite. See *Fish* v. *Klein*, 2 Mer. 431. [The stat. 7 & 8 Vict. c. 66, empowering the Secretary of State to grant certificates of naturalisation, seems to give to the alien no greater right, in this respect, than he acquires under an ordinary act of naturalisation, as it enacts, that "*upon* obtaining the certificate, and taking the oath hereinafter prescribed, every alien now residing in, or who shall hereafter come to reside in any part of Great Britain or Ireland, with intent to settle therein, *shall* enjoy all the rights and capacities which a natural born subject of the United Kingdom can enjoy or transmit, except, &c." As to naturalisation in the colonies, see 10 & 11 Vict. c. 83.]

Proceeds of real estate given to an alien.

[In regard to the question, whether the proceeds of real estate under a trust for conversion can be given to an alien, Lord Cottenham, in the case of *Du Hourmelin* v. *Sheldon*, 4 Jur. 116; 4 Myl. & Cr. 525, affirming the judgment of Lord Langdale, M. R., that the Crown was not entitled, (1 Bea. 79), after stating, that the facts of the present case were different from those of *Fourdrin* v. *Gowdey*, 3 My. & K. 383, where Sir J. Leach, M. R., in deciding in favour of the Crown, put his judgment upon this, that the freehold and leasehold premises retained their proper quality at the testator's death, and passed by the testator's will, not as money, but as freehold and leasehold estate, thus continued: "Now, whether or no the ground upon which this judgment (in *Fourdrin* v. *Gowdey*) is sup-

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ported is well founded, is a question which will have to be decided when facts identical with those in that case shall arise. It is sufficient, at present, to observe, that that is not the present case, in which it cannot be said there is a devise of the real estate, or that there is not an absolute conversion, but merely a devise of land subject to a charge. Here, if the purchase and conveyance is taken directly from the trustees, as directed by the will, the Crown will be excluded. If the Crown is entitled in this case, it must be entitled to all monies left to aliens, if raised out of land; and, if so, it would operate against the legacies of alien legatees directed to be raised out of land; nor could any debtor or other person direct his land to be sold for payment of his debts, if any of his creditors should happen to be foreigners; nor could any foreigner enforce a claim against his English debtor, if the latter had no other property than real estate. It was argued, that, after payment of the charges, the legatees might elect to take the estate in land; but they have not done so: and what the Attorney-General claims is money, and not land. The incapacity to hold land is founded upon reasons not applicable to money. The testatrix has given to her legatees no option to take the land; and if she had, or if the law had given the option, it would be no reason why the legatee should forfeit money which he can enjoy, because, instead thereof, he might have elected to take land which he cannot enjoy. The decision that aliens cannot take an interest in land any more than the land itself, leaves the present question untouched. None of the authorities referred to bear out the position set up on the part of the Crown." See *Taylor* v. *Haygarth*, 14 Sim. 8: *Malcolm* v. *Charlesworth*, 1 Keen, 63.]

Devisee or legatee an attesting witness.

[Another ground of disqualification is the fact of the devisee or legatee being made an attesting witness of the will. This subject will be found treated in the division relating to the execution of wills: see post.]

Effect of devise to heir—old and new law.

[Formerly, the rule was, that where a title by descent and a title by devise met in the same individual, the heir was in by descent, and not by purchase; unless the *quantity* or *quality* of the estate, which the heir took by devise, differed from that which would have descended upon him. (See the cases cited, 1 Jarm. Wills, 67, 68). It is now provided by the 3rd section of the stat. 3 & 4 Will. 4, c. 106, that, when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent.]

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A bastard in esse, whether born or unborn, is competent to be a devisee or legatee of real or personal estate; and the only question that now admits of discussion, in regard to gifts to such persons, is, whether they are sufficiently designated as the objects of them; (see *Gordon* v. *Gordon*, 1 Mer. 141); and this depends on rules of construction of great practical importance in the preparation of wills, and which will hereafter receive examination. Whether a gift can be made to bastards not procreated, is vexata quæstio. The early authorities certainly lean to the negative; the reason being, that "the law does not favour such a generation, nor expect that such shall be:" *Blodwell* v. *Edwards*, Cro. El. 509; Co. Litt. 3. b. But if, as some gentlemen think, the objection arises merely from the uncertainty attaching to objects of this nature, as being filii nullius, until reputation has assigned to them a father, that objection might be removed by a description referring to the maternal parent only, omitting any reference to the father, as "to the future illegitimate children of Ann Wilkins." It is conceived, however, that the objection stands upon a higher principle. Every prospective provision for illegitimate children not only supposes, but indirectly holds out encouragement and sanction to incontinency, and might therefore seem to be impeachable, as having an immoral tendency; though at present no decision can be considered as actually going this length. In the case of *Wilkinson* v. *Adam*, 1 Ves. & Bea. 422, Lord Eldon, in allusion to this point, said he would leave it where he found it, *without any determination.*

Devises and bequests to bastards.

Infancy, coverture, insanity, and idiotcy, do not incapacitate from taking by devise or bequest, though these disabilities of course prevent the subjects of them from testifying their assent or acceptance; the want of which, however, is not allowed to produce any practical inconvenience, being presumed in the absence of evidence to the contrary, unless where such presumption would work injury to the devisee.

Gifts to infants, femes covertes, lunatics, and idiots.

Another impediment to a person taking by devise arises from his dying before the testator, this being a necessary consequence of the ambulatory nature of wills, discussed in the next section. The subject of lapse, however, is so important a branch of testamentary law, that it has been made the subject of separate consideration (*a*).

(*a*) Vide post, Sect. ix.

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V. Execution and attestation.

1. *As to Freeholds of Inheritance before* 1838.

29 Car. 2, c. 3. Wills of lands to be signed and attested by three witnesses.

By the 5th section of the Statute of Frauds (29 Car. 2, c. 3), it was enacted, that "all devises and bequests of any lands or hereditaments, devisable either by force of the Statute of Wills, or by that statute (Statute of Frauds), or by force of the custom of Kent, or the custom of any borough, or any other particular custom, should be in writing, *and signed by the party so devising the same, or by some other person in his presence and by his express direction, and should be attested and subscribed in the presence of the said devisor by three or more credible witnesses,* or else they should be utterly void and of none effect."

Mark, a sufficient signing.

Examining the words in their order, the first question is, what is a "signing" by the testator? The statute did not require that the signature should be the personal act of the testator, but allowed it to be made by any "other person in his presence and by his express direction." In the case of *Right* v. *Price*, Doug. 241, no objection was made to a will devising freehold estates (and the validity of which was disputed on another ground), on account of its bearing only the mark of the testator; and Lord Eldon more recently (*Wright* v. *Wakeford*, 17 Ves. 558) assumed, in the discussion of another point, the sufficiency of a mark to satisfy the statute. [It has since been decided that a mark was a sufficient signing, and that although the testator was able to write: *Taylor* v. *Dening*, 3 Nev. & Per. 228; *S. C.*, nom. *Baker* v. *Dening*, 8 Ad. & E. 94. And since the new statute, where a testatrix signed her will with a mark, her name not appearing, on the affidavit of the two attesting witnesses the will was admitted to probate: *Re Brice*, 2 Curt. 325.] At one time, it appears to have been thought that even sealing alone, without signing, would suffice, see *Lemayne* v. *Stanley*, 3 Lev. 1; but the contrary is now clear, not indeed by the effect of any positive decision, but by the unanimous opinion of every judge who has referred to the point, from Lord Chief Baron Parker and his coadjutors, in the case of *Smith* v. *Evans*, 1 Wils. 313, (though the learned Chief Baron, on another occasion, *Ellis* v. *Smith*, 1 Ves. jun. 12, erroneously supposed it to have been decided the other way), down to Lord Eldon in the case of *Wright* v. *Wakeford*, 17 Ves. 458; these learned judges probably concurring in the conclusion drawn by Lord Hardwicke in the case of *Grayson* v. *Atkinson*, 2 Ves. sen. 458, that

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the statute, in requiring a will to be signed, meant some evidence to arise from the handwriting.

One signature sufficient.

One signature was of course sufficient, though the will were contained in several sheets of paper; and even where the testimonium at the end referred to the preceding sheets as subscribed by the testator, the fact of those sheets being omitted to be signed did not affect the validity of the will, as the testator evidently intended the signing of the last sheet, or the signing and sealing (if the testator has thought proper to affix a seal), to apply to the whole: *Winsor* v. *Pratt*, 5 Moore, 484; *S. C.*, 2 Brod. & Bing. 650.

Local position of the signature.

It was immaterial, under the Statute of Frauds, in what part of the will the testator's name was written; [under the recent statute the signature must be at "the foot or end;"] and where the whole will was in the testator's handwriting, the name occurring in the body, as the usual exordium—"I, A. B., do make," &c., was decided to be a sufficient signing: *Lemayne* v. *Stanley*, 3 Lev. 1; Freem. 538, 1 Eq. Ca. Ab. 403, pl. 9, *S. C.*; *Cook* v. *Parsons*, Pre. Ch. 184; see also *Hilton* v. *King*, 3 Lev. 86; *Grayson* v. *Atkinson*, 2 Ves. sen. 454; *Coles* v. *Trecothick*, 9 Ves. 249. But the signature, whatever were its local position, must have been made with the design of authenticating the instrument; for, it should seem, that if the testator contemplated a further signature, which he never made, the will was to be considered as unsigned: *Right* v. *Price*, lessee of *Cator*, Doug. 241; see also *Griffin* v. *Griffin*, 4 Ves. 197, n.; *Coles* v. *Trecothick*, 9 Ves. 249; *Walker* v. *Walker*, 1 Mer. 503; though, it should be observed, that in *Right* v. *Price* the point was not decided; and the reasoning seems only to apply where the intention of repeating the signature remained to the last unchanged, for a name originally written with such design might afterwards be adopted by a testator as the final signature; and such, it is probable, would be the presumed intention, if the testator acknowledged the instrument as his will to the attesting witnesses, without alluding to any further act of signing.

What a sufficient publication.

It will be observed, that the testator was merely required by the statute to "sign;" but it was formerly considered, that, independently of this enactment, publication was necessary to complete the testamentary act. Lord Hardwicke, in particular, in the case of *Ross* v. *Ewer*, 3 Atk. 156, strenuously insisted on the necessity of publication. On the other hand, in the case of *Moodie* v. *Reid*, 7 Taunt. 361, Sir V. Gibbs, C. J., expressed a decided opinion that publication was not an essential part of a will, not being, as he conceived, necessary to devises by custom at common law, nor made so by the

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statutes of Henry VIII. and Charles II.; and subsequent Judges have virtually adopted the latter opinion, having (as we shall presently see) decided that a will of freehold lands might have been duly executed by a testator, [in accordance with the Statute of Frauds,] without his uttering a syllable declaratory of the nature of the instrument.

Witnesses need not have seen the testator sign.

Another question was, whether the attesting witnesses ought to see the testator actually sign, or whether his acknowledgment of the signature was sufficient; and the rule was established, not only that an acknowledgment would suffice, but that it might be made before each witness separately, and need not have taken place in the simultaneous presence of all. This point, though doubted in some of the early cases, (*Cook* v. *Parsons*, Prec. Chan. 184, and *Dormer* v. *Thurland*, 2 P. W. 506), was decided by Sir Joseph Jekyl, in the case of *Smith* v. *Codron*, cit. 2 Ves. sen. 455, where A. signed and published a will in the presence of two persons, who attested it in his presence; then, a third person was called in, to whom the testator shewed his name, telling him that was his hand, and bidding him witness it, which the witness did in the testator's presence, who, two hours afterwards, told him that the paper he had subscribed was his will: this was held to be a good execution. Since this case the doctrine has been confirmed by many decisions: *Stonehouse* v. *Evelyn*, 3 P. W. 253; *Grayson* v. *Atkinson*, 2 Ves. sen. 454; *Ellis* v. *Smith*, 1 Ves. jun. 11; *Addy* v. *Grix*, 8 Ves. 504; *Westbeech* v. *Kennedy*, 1 Ves. & B. 362; *Wright* v. *Wright*, 5 Moo. & P. 316.

Witnesses might have attested separately and at different times.

As it was sufficient for the testator to sign before some, and acknowledge the signature before the rest, of the witnesses, so, by necessary consequence, an acknowledgment before all was equally effectual. Such were the circumstances in the case of *Ellis* v. *Smith*, 1 Ves. jun. 11, which was solemnly decided by Lord Hardwicke, with the assistance of Sir John Strange, M. R., Lord C. J. Willes, and Lord C. B. Parker. Lord Hardwicke considered the sufficiency of the testator's declaration to have been virtually decided by the cases establishing that the witnesses might attest at different times; for, if the testator signed three times, there were three executions, and none of them good.

The next question was, what constituted a sufficient acknowledgment before the witnesses. In the case of *Gryle* v. *Gryle*, 2 Atk. 176, Lord Hardwicke doubted whether it was enough for the testator to say before the witness—"This is my will," without a resealing, (for the instrument, in that case, had the unnecessary appendage of a seal), or unless the testator had declared it to be his handwriting;

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but the doubt appears to have vanished from the mind of the noble Judge in the case of *Ellis* v. *Smith*, 1 Ves. jun. 11, where the point was stated in general terms to be, whether a testator's declaration before three witnesses, that it is his will, was equivalent to signing; and the conclusion, therefore, of the learned Judges, in favour of the validity of the will, amounted to an affirmation of the sufficiency of such a declaration.

Witnesses need not see the testator's signature, or know the nature of the instrument.

Several modern decisions have placed the point beyond all doubt, by going much farther; these cases having decided, that, where a testator, who had previously signed his will, merely requested the witnesses to subscribe the memorandum of attestation, though they neither saw his signature nor were made acquainted with the nature of the instrument they attested, yet the will was duly executed according to the statute: *British Museum* v. *White*, 3 M. & P. 689; 6 Bing. 310; *Wright* v. *Wright*, 5 M. & P. 316; 7 Bing. 457; *Johnson* v. *Johnson*, 1 C. & M. 140. In the first of these cases, Lord Chief Justice Tindal said—"When we find the testator knew this instrument to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge *in fact*, though not *in words*, to the three witnesses, that the will was his."

Attestation by witnesses' mark sufficient.

The next requisition was, that the will were "attested and subscribed" by three witnesses. A mark was decided to be a sufficient subscription: *Harrison* v. *Harrison*, 8 Ves. 185; *Addy* v. *Grix*, Id. 504; [and the new law has made no alteration in this respect;] but it is never advisable where it can be avoided, and now that the art of writing is so common seldom necessary, to employ marksmen as witnesses.

Memorandum of attestation need not record the fact of the testator's presence.

No particular form of words was essential to constitute an attestation. It was not requisite (though always proper) that the memorandum subscribed by the witnesses should mention their having subscribed in the presence of the testator, but which fact of course must be clearly and distinctly proved by oral testimony when the validity of the will is called in question, whether the memorandum of attestation records it or not: *Hands* v. *James*, Comyns, 531; *Croft* v. *Pawlet*, 2 Str. 1109; *S. C.*, 8 Vin. Ab. 128, pl. 14; *Brice* v. *Smith*, Willes, 1; *Lord Rancliff* v. *Lady Parkins*, 6 Dowl. 202. And even where the death of the witnesses prevents the obtaining actual proof, the fact in question would, it seems, though not recorded, generally be presumed: *Hands* v. *James*, *Croft* v. *Pawlet*, supra.

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Subscription by witnesses must have been in the testator's presence.

It is to be observed, that the will was required to be subscribed by the witnesses in the *presence* of the testator. The design of the Legislature in making this requisition evidently was, that the testator might have ocular evidence of the identity of the instrument subscribed by the witnesses; and this design has been kept in view by the Courts, in fixing the signification of the word "presence," [the decisions respecting which are equally applicable to wills executed under the new act]. To constitute it, in the first place it is essential that the testator should be capable of recognising the act which is being performed before him; for, if this power be wanting, his mere corporal presence will not avail. Thus, if a testator, after having signed and published his will, and, before the witnesses subscribe their names, falls into a state of insensibility, (whether permanent or temporary, would, of course, be immaterial), the attestation is insufficient: *Right* v. *Price*, Doug. 241.

"Presence" held to mean *within the view*.

And the testator ought not merely to possess the mental power of recognising, but be actually conscious of the transaction in which the witnesses are engaged; for, if a will were attested in a secret and clandestine manner, without the knowledge of the testator, the fact of his being in the room where it was done would not sustain it. See *Longford* v. *Eyre*, 1 P. W. 740. Nor, on the other hand, would the circumstance of the testator not being in the same room invalidate the attestation, if it took place *within his view*. Thus, in the case of *Sheers* v. *Glasscock*, 2 Salk. 688, cit. Carth. 81, where the testator, being in extreme illness, the witnesses, after he had signed the will, withdrew into a gallery, between which and the testator's chamber there was a lobby with glass doors, and the glass broken in some places; in this gallery the witnesses subscribed the will. It was proved, that the testator might have seen, from his bed, the table in the gallery where the witnesses subscribed, through the lobby and the broken glass windows; and this was adjudged a good will to pass lands; for the statute required attesting in his presence to prevent obtruding another will in place of the true one: it was, therefore, enough if the testator *might* see, it was not necessary that he *should* actually see the signing; because, if that were the case, if a man did but turn his back, or look off, it would vitiate a will; here the signing was within view of the testator, he might have seen it, and that was enough. So, in *Davy* v. *Smith*, 3 Salk. 395, where the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there subscribed their names on a table in the middle of the room and opposite to the door, and both that door and the door of the room where the testator lay were open,

so that he might have seen them subscribe their names if he would; that was held sufficient, though there was no proof that the testator did see them subscribe; for it was possible that the testator might have seen them subscribe. And, in the preceding case, it was said, per curiam, that, if the witnesses subscribe their names in the same room where the testator lies, though the curtains of the bed be drawn close, it is a good subscribing, because it is in his power to see them, and what is done shall be construed to be in his presence.

Testator and witnesses need not be in the same house.

It is not even necessary that the testator should be in the same house with the witnesses; for, in *Casson* v. *Dade*, 1 B. C. C. 99; *S. C.*, Dick. 586, where a feme coverte, having power to make a writing in the nature of a will, ordered such an instrument to be prepared, and went to her attorney's office to execute it; but, being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution, they returned into the office to subscribe it, and the carriage was put back to the window of the office, through which, it was sworn by a person in the carriage, the testatrix might have seen what passed. Lord Thurlow was of opinion that the will was well executed.

Mere contiguity not sufficient, if the testator's view be obstructed.

The mere contiguity of the respective places occupied by the testator and the witnesses, of course, will not avail, if the testator's view of the witnesses is necessarily obstructed. Thus, in *Eccleston* v. *Petty*, Carth. 79; Comb. 156; 1 Show. 89; Ca. T. Holt, 222; where the witnesses proved that the testatrix signed the will in her bed-chamber, and they subscribed it in the hall, and that it was not possible from her chamber to see what was done at the table in the hall, there being a passage and eight or ten turning stairs between those places, the will was held not to be duly attested.

Witnesses must be visible in testator's actual position.

And it is not enough, that, in *another* part of the same room, the testator might have perceived the witnesses, if, in his actual position, it was impracticable. And, therefore, in the case of *Doe* d. *Wright* v. *Manifold*, 1 Mau. & S. 294, where the testator was in bed in a room, from one part of which he might, by inclining his head into the passage, have seen the witnesses attest the will, but not in the situation in which he was, the attestation was decided not to be good. Lord Ellenborough said—"In favour of attestation, it is presumed, that, if the testator might see, he did see; but I am afraid, that, if we get beyond the rule which requires that the witnesses should be actually within reach of the organs of sight, we shall be giving effect to an attestation out of the devisor's presence, as to which the

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rule is, that, where the devisor cannot by possibility see the act doing, that is out of his presence."

Where the evidence fails to shew in what part of the room the subscription took place, it would be presumed that the most convenient was the actual spot, and the ordinary position of a table probable to have been used would be material: *Winchelsea* v. *Wauchope*, 3 Russ. 444.

It is scarcely necessary to add, as a concluding remark on this subject, that the occasion of the absence of the witnesses, whether for the ease or at the express request of the testator, or any other cause, is quite immaterial: *Broderick* v. *Broderick*, 1 P. W. 239; *Machell* v. *Temple*, 2 Show. 288.

Witnesses must formerly have been credible.

Credibility to be at the time of attesting.

The statute, it will be observed, required the attestation of *credible* witnesses. It seems to be the better opinion, that the inquiry into credibility must be directed to the time of the attestation, and not to that of the witnesses' examination; the grounds of which doctrine were thus forcibly vindicated by Lord Camden, in his judgment, in the case of *Doe* d. *Hindson* v. *Kersey*, 4 Burn's Eccl. Law, 97, [8th ed.; 116, 9th ed.]—"A will," said his Lordship, "is often executed suddenly in a last sickness, and sometimes in the article of death; and the great question to be asked in such cases is, whether the testator were in his senses when he made the will, *and consequently the time of the execution is the critical moment which required guard and protection.* What is the employment of the witnesses?—it is to attest, and to judge of the testator's sanity when they attest; and if he is not capable, they ought to refuse to attest. In some cases the witnesses are passive; here they are active, and, in truth, the principal parties to the transaction;—the testator is intrusted to their care." See also *Brograve* v. *Winder*, 2 Ves. jun. 636.

Gifts to attesting witnesses void, by stat. 25 Geo. 2, c. 6.

Incompetency to attest the execution of a will might have been created by [mental imbecility,] interest, or crime. The disqualification of interest was much narrowed by the stat. 25 Geo. 2, c. 6, which made absolutely void every devise or bequest to attesting witnesses; but the act provided, that a creditor, whose debt was charged on the real estate, should be a good witness. As to this statute, the following points were decided:—1st. That it extended only to persons beneficially interested, and not to a devisee or executor in trust: *Anon.* 1 Mod. 107; *Lowe* v. *Jolliffe*, W. Blackst. 365; *Holt* v. *Tyrrell*, 1 Barn. K. B. 12; *Battison* v. *Bromley*, 12 East, 250; *Phipps* v. *Pilcher*, 6 Taunt. 220; *S. C.*, 1 Madd. 144. See also *Goss* v. *Tracey*, 1 P. W. 290; *Goodtitle* v. *Welford*, Doug. 139.—2ndly.

Points decided on the statute.

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That it did not apply to wills of personal estate; for, as such wills did not require an attestation, the ground for vacating the gift to the witness failed: *Brett* v. *Brett*, 3 Addams, 210; [1 Hagg. 58, n.;] *Emanuel* v. *Constable*, 3 Russ. 436; [*Foster* v. *Banbury*, 3 Sim. 40]; which overrule *Lees* v. *Summersgill*, 17 Ves. 508.—3rdly. That the statute only applied where the witness took a direct interest under the will, and not where his interest arose consequentially. Thus, where one of the three attesting witnesses to a will was the husband of a devisee in fee of a freehold estate, who would jure uxoris have derived an interest in the devised lands; it was held, that the devise was not within the statute, and consequently the attestation was insufficient: *Hatfield* v. *Thorp*, 5 Barn. & Ald. 589.

Witnesses formerly disqualified by crime.

Persons rendered infamous by conviction for crime, were of course incompetent witnesses to a will under the old law: *Pendock* v. *Mackinder*, 4 Burn's Eccl. Law, 93; Willes, 665.

Stat. 7 Will. 4 & 1 Vict. c. 26.

[The recent statute (7 Will. 4 & 1 Vict. c. 26) repeals the stat. 25 Geo. 2, c. 6, except as to the colonies in America, and makes the following provisions as to the incompetency of attesting witnesses:—

Will not to be void on account of incompetency of attesting witness.

Sect. 14 provides, "That, if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid."]

Gift to an attesting witness, or wife or husband of witness, to be void.

[Sect. 15. "That, if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will."]

Creditor attesting to be admitted a witness.

[Sect. 16. "That, in case, by any will, any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof."]

Executor to be

[Sect. 17. "That no person shall, on account of his being an

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admitted a witness.

executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof."]

[See Mr. Jarman's remarks on these enactments, 1 Jarm. Wills, 66, 67, where the learned commentator observes, that, "in allowing an attesting witness to be appointed executor, whether he be or be not in terms made an executor in trust, regard is evidently had to the statute of 1 Will. 4, c. 40, which precludes executors from claiming, by virtue of their office, the beneficial interest in the undisposed of personal estate of their testator, to which, by the pre-existing law, an executor was entitled, when the will did not afford any presumption of a contrary intention—a point which was often difficult of solution."]

The subject of the competency of witnesses may be dismissed with the observation, that, in the choice of witnesses, it should not be considered enough that they are within the pale of legal competency; they ought to be persons whose character and station in society would give weight to their testimony in case the validity of the will were disputed, and which, let it be remembered, may be done on the allegation not only of mere informality in the execution or attestation, but of mental incompetency; in which case the evidence of three respectable and intelligent witnesses to the will, in favour of the testator's sanity (*a*) at the moment of its execution, will often outweigh the testimony of a host of witnesses speaking to occasional aberrations. See *Kemble* v. *Church*, 3 Hagg. 275. Another advantage in having witnesses of a considerable station in society, is the greater facility of proving their decease and handwriting.

Attestation will apply to several clauses written at different times.

A will may be composed of several clauses written at distinct intervals, and one memorandum of attestation subscribed to any part has been held to apply to the whole, including as well what was long before written, as what had been recently added, though the antecedent part bore a different date from, and was complete in itself independently of, the latter: *Carleton* v. *Griffin*, 1 Burr. 549. [But the words "and shall *sub*scribe the same" seem to require that the witnesses should sign their names at the end of the will. Similar words occur in the enactment of the Statute of Frauds.]

Also to several sheets, provided all were present.

And the same general doctrine applies to a will whose contents are distributed through several sheets of paper, which would be adequately attested by a single memorandum, provided all the detached

(*a*) Vide Lord Thurlow's judgment in *Attorney-General* v. *Parnther*, 3 B. C. C. 442, and cases passim in the Ecclesiastical Reports of Drs. Phillimore, Addams, and Haggard.

parts were present when the act of attestation took place; and which presence it seems would be presumed, unless the contrary were distinctly proved; *Bond* v. *Seawell*, 3 Burr. 1775; as would also the fact of the attestation being intended to apply to the whole.

One attestation sufficient for a will and codicil.

The presumption would be somewhat less, of course, when the respective papers have each a distinct character independent of the other, as where one is a will and the other a codicil, or they consist of two separate codicils.

Attestation of codicil held not to apply to a will.

It was held, under the Statute of Frauds, that, where a testator made a will which he caused to be attested by two witnesses, and afterwards made a codicil, which he also procured to be attested by two witnesses, neither the will nor the codicil was adequate to the devise of freehold lands; for, though the attesting witnesses to both aggregately made up the requisite number, yet, as the memorandum of attestation subscribed to the codicil was evidently not intended to apply to the will, it could not be so construed: *Lea* v. *Libb*, Carth. 35. If, however, evidence were adduced of such an intention, the attestation would have applied to both: *Bond* v. *Seawell*, 3 Burr. 1775.

Attestation held to apply to both will and codicil written on the same paper, where codicil refers to will.

And even without any positive evidence of intention, it seems that a memorandum of attestation will extend to a will and codicil, or several codicils, written on the same sheet of paper. Thus, in the case of *De Bathe* v. *Lord Fingal*, 16 Ves. 167, where a testator made a will for the purpose, among other things, of appointing guardians to his children. This will was attested by one witness only. The testator afterwards executed a codicil to the will written on the same sheet of paper, and attested by three witnesses, and which was declared to be a codicil to his will thereunto annexed. The attestation was held to apply to the will, so as to constitute it a good testamentary appointment of guardians within the statute 12 Car. 2, c. 24, [which required that the appointment should have been signed in the presence of two witnesses].

So, in the case of *Doe* d. *Williams* v. *Evans*, 1 Cromp. & Mee. 42, where A. made a will, professing to devise freehold property, but which was neither signed nor attested, though an attestation clause was drawn out; a fortnight afterwards, a codicil was written below this clause on the same sheet of paper, in the following terms: —"I, A., make a codicil to the foregoing will, and thereby ordain that my wife, B., be entitled to 200*l.* of my property in case she marry." (There was no date.) It was signed by the testator, and attested by three witnesses, thus— Witness J. W.
J. H. L.
W. H.

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The Court of Exchequer held, that the execution and attestation applied to the whole of what was on the paper, and, consequently, that the will was duly attested for the devise of freeholds. Much reliance was placed on the case of *Carleton* v. *Griffin*, and on the circumstance of the codicil referring to the will; Mr. Baron Bayley observing, that, if the codicil had not referred to the will, he should have thought that it did not set up that instrument.

Attestation held to apply to both will and codicil written on the same paper, *without express reference.*

And in *Guest* v. *Willasey*, 12 Moore, 2, where a testator, on the back of his will, which was duly attested, wrote three codicils of different dates, of which the last alone was attested by three witnesses, and which did not in terms refer to the preceding codicils, but merely partially revoked an appointment of executors made by the second codicil, it was held that the third codicil operated as a republication, not only of such second codicil, but also of the first, between the contents of which and of itself there was no connection. The term "republication," which was applied to this case (and would assign to it a different position in the present dissertation), seems not accurately to express the principle; for it is conceived that the true ground on which the case must stand, is, that the attestation of the third codicil was intended to apply to the three. Had they not been written on the same piece of paper, it is obvious that the point would have been more doubtful, though, in regard to the effect of the codicil as a republication of the will properly so called, this would have been immaterial.

It would not be safe to consider these cases as authorising the general conclusion, that every codicil, duly attested, will communicate the efficacy of its attestation to the previous unattested will and codicils. The contrary was ruled in the early case of *Attorney-General* v. *Baines* (*a*), Pre. Ch. 270; 3 Ch. Rep. 150, where a testator wrote a will, in his own hand, but without witnesses; and afterwards made a codicil, wherein he recited and took notice of the will, which codicil was subscribed by four witnesses; and it was treated as clear, by the Lord Chancellor, that the will was inoperative to devise freehold

(*a*) [In his Treatise on Wills, Vol. 1, p. 81, Mr. Jarman has observed:— "The line of argument adopted by the Court of Exchequer in *Doe* v. *Evans* leads to the conclusion, that the result would have been the same if the unattested will and the attested codicil had been detached; the only effect of their being united in the same paper being to render unnecessary any express reference to the unattested document, for the purpose of identifying it. And the observations which fell from the Court of King's Bench in the more recent case of *Utterton* v. *Robins*, 1 Ad. & Ell. 423, indicate a strong inclination in that Court to a similar opinion. These authorities shew that no reliance is to be placed on the early case of *Attorney-General* v. *Baines*."]

lands. Either this case is overruled by the modern decisions, or the principle of those decisions must be confined to cases in which the will and codicil are written on the same paper; though, in *Doe* d. *Williams* v. *Evans*, the Court certainly relied principally on the reference in the codicil to the will. In *Guest* v. *Willasey* there was no such reference; but the two instruments being on one paper seemed to render it unnecessary. Where this is not the case, it would at least be requisite that the codicil should, by a reference to date, or some other means, identify the unattested paper to which it refers, as the will of the testator.

Where an attested codicil refers to the will, but not to a prior unattested codicil.

[In the case of *Utterton* v. *Robins*, 1 Ad. & Ell. 423, where a testator, by several unwitnessed memorandums subsequent to his will (which was duly attested), left a freehold house, acquired among other estates since the date of the will, to his daughter; and he afterwards made the following codicil, which was duly attested:—"I make this a further codicil to my will; I give and devise all real estates purchased by me since the execution of my said will, to the trustees therein named, their heirs, &c., to the uses and upon the trusts therein expressed concerning the residue of my real estates:" it was held that the house passed to the trustees, and not to the daughter.]

[In *Gordon* v. *Lord Reay*, 5 Sim. 274, where the first codicil was unattested, and the second codicil was duly attested, Sir L. Shadwell, V. C., said—"My opinion is, that the second codicil does republish the first. The first codicil is part of the will; and if the second codicil is a republication of the will, it is a republication of everything that is part of the will. The second codicil does refer to the will; it ratifies and confirms the will, and everything that is part of it."]

Testator may refer to extrinsic documents;

It is not to be doubted that a testator may so construct his disposition as to render necessary a reference to some document (as to any other extrinsic fact), in order to elucidate or explain his intention; and such a document need not be attested by three witnesses, it being referred to not in the character of a testamentary paper or as a component part of the will. As, where a testator devises all lands which were conveyed to him by certain indentures (describing them), or devises to the uses expressed by a particular indenture of settlement, it is clear that the indentures so referred to might be consulted for this purpose, without any evasion of the enactment respecting wills in the Statute of Frauds; the testator's intention being manifested by a will duly attested, though in such a manner as to involve a reference to a circumstance dehors the will. See *Habergham* v. *Vincent*, 2 Ves. jun. 204; also *Molineux* v. *Molineux*, Cro. Jac. 144. [But the document must be clearly identified as the instrument to

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which the will refers. In *Dillon* v. *Harris*, 4 Bligh, N. S., 329, a paper was rejected from a defect of identification.]

but cannot create a power to devise by an unattested codicil.

The attempt to create, by a will duly attested, a power to devise freehold lands by a future unattested codicil, was obnoxious to a very different train of reasoning. To allow such a paper to become supplementary to the contents of the will itself, would not only introduce all the evils, against which the Statute of Frauds was directed, but would give to the will an operation in the testator's lifetime contrary to the fundamental law of the instrument. Accordingly, where a testator, by a will attested by three witnesses, devised his real estate to trustees, upon trust (subject to certain limitations thereby created) to convey the same to such persons, and for such estates, as he by deed or will, attested by two witnesses, should appoint; and the testator, professing to exercise this power, executed an instrument attested by two witnesses, which he styled a deed-poll, and thereby carried on the series of limitations commenced in his will, it was decided, after much consideration, that this instrument operated as a codicil to the will, and was incapable of affecting the freehold lands, for want of an attestation by three witnesses: *Habergham* v. *Vincent*, 2 Ves. jun. 204; S. C. nom. *Stansfield* v. *Vincent*, 4 B C. C. 353; *Rose* v. *Cunynghame*, 12 Ves. 29; *Wilkinson* v. *Adam*, 1 Ves. & Beav. 422; [*Whytall* v. *Kay*, 2 Myl. & Kee. 765, and see Sect. I. FORM OF INSTRUMENT.]

Land could not have been converted by will, so as to be disposable by unattested codicil.

Upon the same principle, a testator could not so convert his real estate into personalty by a will duly attested, as to render it disposable, by an unattested codicil, as personal estate. See *Sheddon* v. *Goodrich*, 8 Ves. 481; *Hooper* v. *Goodwin*, 18 Ves. 156; *Gallini* v. *Noble*, 3 Mer. 691.

General charge of legacies extended to those bequeathed by an unattested codicil.

In one instance only, and that founded upon special grounds, not interfering with the principle in question, the freehold estate of a testator was, [under the Statute of Frauds,] indirectly liable to be affected by an unattested codicil. This occurred where a testator had, by a will duly attested, charged his lands with legacies; which charge, it was held, extended not merely to the legacies bequeathed by that will, but also to such as might be bequeathed by an unattested codicil: *Hide* v. *Hide*, 1 Eq. Ca. Ab. 409; *S. C.*, 3 Ch. Rep. 83; *Masters* v. *Masters*, 1 P. W. 421; *S. C.*, 2 Eq. Ca. Ab. 192, pl. 7; *Lord Inchinquin* v. *French*, Amb. 33; *Brudenell* v. *Boughton*, 2 Atk. 268; *Habergham* v. *Vincent*, 2 Ves. jun. 204; *S. C.*, 3 B. C. C. 353; *Buckeridge* v. *Ingram*, 2 Ves. sen. 652; *S. C.*, 7 Ves. 652; *Sheddon* v. *Goodrich*, 8 Ves. 481; *Wilkinson* v. *Adam*, 1 Ves. & Bea. 445.

This doctrine was considered to be warranted by the rule applicable to the case of a general charge of debts; for, since a testator may, after charging his real estate with debts, increase the burthen on the land to an indefinite extent, by contracting fresh debts, without any further direct act of oneration, it has been thought that a charge of legacies ought, by analogy to this rule, to include legacies given by an unattested codicil; in short, that, as a charge of debts extends to all debts which may happen to be owing at the testator's decease, so, a charge of legacies extends to all legacies which shall *then* happen to be bequeathed.

Grounds of the doctrine.

The doctrine in question, adhering to the analogy in which it originated, was confined to the case of a simple and general charge. If, therefore, a testator, instead of creating a general charge of legacies (leaving it to the ordinary rule to determine what are legacies), subjected his freehold estate expressly to such legacies as he should thereafter bequeath by an unattested codicil, this was considered as amounting, in effect, to the reservation of a power by will to dispose of the land by an unattested codicil. It differed from the case of a charge of legacies generally, in this respect, that, unless the codicil bequeathing a legacy expressed that the land should be charged therewith, it could not be charged, and therefore it was not chargeable on the land as legacy merely, but through the medium of an unattested testamentary instrument: *Rose* v. *Cunynghame*, 12 Ves. 29 (*a*). Where a testator, after bequeathing certain legacies,

Express power to bequeath such legacies could not have been created.

(*a*) [In *Rose* v. *Cunynghame*, Sir W. Grant, in his luminous manner, thus explained the distinction:—"The reason that debts and legacies may be a burthen upon the estate, is, that they constitute a fluctuating charge. It is impossible previously to ascertain what debts a man may owe at the time of his death; and it is difficult to ascertain, when he is making his formal and regular will, what legacies he may think fit, or his fortune will enable him, to give. The Court has therefore said, that, when he has by a will, duly executed, charged debts and legacies, it is only necessary to shew that there is a debt, or that there is a legacy, in order to constitute a charge; for the moment that character is shewn to belong to the demand, you shew that it is already charged upon the estate. Then, an unattested instrument is itself perfectly competent to give a legacy; and, when given, you predicate of it, that it is a legacy; and then the charge immediately attaches by virtue of the executed will. But here the testator says, he does not now determine that all annuities and all legacies he shall hereafter give shall be charges; but only that, if at some future period he shall think proper to declare legacies and annuities to be charges upon this real estate, then the trustees shall pay them out of the real estate. Therefore, not only the legacy is to be found, but also the will of the testator to make it a charge upon this estate, without which it is not a charge. That is only an attempt to reserve by a will, duly executed, a power to charge by a will not duly executed. It is the case of *Habergham* v. *Vincent*, ... Unless he thinks fit, when he makes his codicil, to declare his intention, that

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devised his freehold estate for a term, for the purpose of raising them, and also the several other legacies *thereinafter* bequeathed: it was held by Lord Eldon, that certain additional legacies, which he bequeathed by an unattested codicil, were not payable out of the real estate under the trusts, on the ground "that it was not a general charge of legacies:" *Bonner* v. *Bonner*, 13 Ves. 379.

Whether the personalty must have been primarily liable, in order that the rule may apply.

It is to be noticed, also, that a general charge, either of debts or legacies, onerates the land only as an auxiliary fund, the personalty being still primarily liable; which circumstance has been so often mentioned as an ingredient in cases of this nature, as to raise a doubt whether the rule under consideration would not be repelled by the absence of it; though, certainly, the analogy to a charge of debts suggests no such limitation of the doctrine; for, if a person charges his real estate with his debts, the charge will equally extend to all the debts which he owes at his decease, whether the personalty be exempted or not. At all events, it is clear that a testator, after having charged his real estate with legacies, without exempting the personalty from its primary liability, might, by an unattested codicil, have bequeathed any portion of his personal estate exempt from the charge, which, of course, would have the same effect of augmenting the burthen upon the land, as an increase in the amount of the legacies: *Coxe* v. *Basset*, 3 Ves. 155.

Revocation of legacies by an unattested codicil under the old law.

In accordance with the suggested confinement of the doctrine to legacies payable out of the general personal estate, it seems to have been decided, that, though it was clear that such legacies, once charged by a will duly attested, might be revoked or modified by an unattested codicil; *Brudenell* v. *Boughton*, 2 Atk. 268; *Attorney-General* v. *Ward*, 3 Ves. 327; yet, that a sum, whether annual or in gross, which was charged specifically and primarily upon land, was susceptible of no alteration in regard to the subject or object of the devise, by means of an unattested codicil; and the circumstance that a particular portion of personal estate was combined with the realty in the charge, would not vary the principle. And therefore, where a testator devised an annuity out of a certain estate, *stock, and uten-*

his land shall be charged with the legacy or annuity, it shall not be charged. Then it is through the medium of an unattested instrument that it is to be a charge upon land; and that cannot be within that case."]

[Where a testator directed his real and personal estate to be sold, and the monies arising from the sale to be applied in the first place to the payment of his debts, funeral and testamentary expenses, and also the legacies which he might bequeath by any codicil or codicils to his will; and he afterwards gave an annuity to his wife by an unattested codicil: it was held, that the annuity was well charged on the real estate: *Swift* v. *Nash*, 2 Kee. 20.]

sils, it was held not to be affected by an unattested codicil expressly revoking it: *Beckett* v. *Harden*, 4 Mau. & Sel. 1. And even where a testator, by a will duly attested, gave all his real and personal estate to trustees, upon trust, out of the rents of the real and the produce of the personal estate, to pay his debts and funeral and testamentary expenses and legacies, and, in the next place, to pay two life annuities, and the testator, by a codicil attested by one witness only, revoked one of the annuities, it was held that such annuity continued a charge upon the real estate: *Mortimer* v. *West*, 2 Simons, 274. It seems difficult to say that this annuity was not charged primarily on the personal estate; (see *Fitzgerald* v. *Field*, 1 Russ. 425); and in this point of view the case stands alone.

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But, even where the charge on the land was confessedly auxiliary, yet it seems that, if a testator, instead of expressly revoking the legacies bequeathed by his will, attempted, by an unattested will, to make an entirely new disposition of his freehold and personal estate, as this was operative on the personalty only, the legacies remained a charge on the realty; because the effect of what the testator had done, merely was to withdraw one of the funds on which the legacies were charged, and not the legacies themselves: *Buckeridge* v. *Ingram*, 2 Ves. jun. 652. And it would have been immaterial that the will contained an express clause of revocation of all former wills: *Sheddon* v. *Goodrich*, 8 Ves. 500.

Distinction where a new disposition of the charged property was attempted to be made.

2. *As to Personal Estate and Copyholds before* 1838.

PERSONALTY AND COPYHOLDS. EXECUTION BEFORE 1838.

All that the Statute of Frauds (29 Car. 2, c. 3) required to the validity of wills of personalty and copyholds, was contained in the clauses regulating nuncupative wills (*a*). The 19th section provided, "That no nuncupative will shall be good, where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof; nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where

Stat. 29 Car. 2, c. 3.

Concerning nuncupative wills.

(*a*) [In his Treatise on Wills, Vol. 1, p. 89, Mr. Jarman observes:—"Nuncupative wills were not forbidden by the Statute of Frauds, but were placed under such restrictions as practically abolished them."]

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such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling."

Sect. 20. "That, after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will."

Sect. 21. "That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days at the least after the decease of the testator be fully expired; nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same, if they please."

Sect. 23 directed that any soldier, being in actual military service, or any mariner or seaman, being at sea, might dispose of his moveables, wages, and personal estate, as before the act. This clause has been considered to apply to seamen on board merchants' vessels. The wills of seamen and marines, and non-commissioned officers of marines, were subjected to peculiar regulations, by stat. 26 Geo. 3, c. 63; 32 Geo. 3, c. 34, s. 1; 11 Geo. 4 & 1 Will. 4, c. 20, ss. 48, 49, 50; and 2 & 3 Will. 4, c. 40, ss. 14, 15, [which are not repealed by the 7 Will. 4 & 1 Vict. c. 26. See Sects. 11, 12].

What a good will of personalty.

In two instances only did any attempt seem to have been made to subject wills of personal estate to a more formal mode of execution than was required by the enactment in question, whose requisition was considered to be satisfied by the will being put into writing during the lifetime and by the direction of the maker, though it had not been signed, and was never even seen by him. See *Allen* v. *Manning*, 2 Hagg. 490. And the Ecclesiastical Reports abound in cases in which papers have been received as testamentary, the execution of which was wholly prevented by the death of the testator: *Re Taylor*, 1 Hagg. 641. The two instances before referred to, in which the Legislature imposed additional formalities of execution, in regard to particular subjects of personal estate, related to estates pur autre vie, (which, when limited otherwise than to the heirs of the deceased owner, or not limited at all, are personal estate), to the devise of which the Statute of Frauds required three witnesses; and stock in the public funds, which it was provided by certain acts of Parliament should pass only by wills attested by two witnesses. But these exceptions to the general rule were rendered, in a great measure, practically nugatory, by the doctrine established by the case of *Rip-*

ley v. *Waterworth*, 7 Ves. 425, that an executor taking freeholds pur autre vie as special occupant, or even in the absence of special occupancy, was bound to deal with them as part of the general personal estate of the deceased owner. The same principle would clearly apply to stock in the public funds, and, probably, would extend to estates pur autre vie and stock specifically bequeathed, which an executor would surely not be allowed to hold in opposition to a specific legatee claiming under an unattested will. [Such a question cannot arise under a will subject to the present law, which has abolished all distinctions between different kinds of property in regard to the mode of execution.]

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Even under the old law, prudence obviously suggested that testators should not avail themselves of the extreme limit allowed by the liberality or laxity of the rules of law in regard to the execution of wills of personal estate, but that such wills should invariably be not only signed, but also attested by two witnesses, as the want of such an attestation occasioned the necessity, when the will was proved in the Ecclesiastical Court, of adducing proof of the handwriting of the testator, by affidavit. If the paper was not only unattested, but unsigned (as where a will was prepared pursuant to the instructions of a testator, who died before it was executed), the Prerogative Court granted probate in common form, but not without the consent being obtained of the parties interested, or at least of such of them as were in esse; for the rest would not be bound: *Re Taylor*, 1 Hagg. 641. [See some observations, 1 Jarm. Wills, 91, as to the principles adopted by ecclesiastical courts in adjudicating on the validity of wills, whose date brings them within the old law.]

Convenience attending the attesting of wills of personalty.

The exclusion of copyholds from the devising clause of the Statute of Frauds was the result of the narrow construction which that clause received from the courts of judicature, rather than of any restrictive terms in the enactment itself, the language of which, in the opinion of some eminent judges, was sufficiently comprehensive to have warranted its application to copyholds. (See 2 P. W. 258; 1 Ves. sen. 227; 7 East, 322). It seems to have been thought, however, that, as copyholds passed by the surrender and will taken together, and not by the will alone, (the effect being the same as if the devisee's name had been inserted in the surrender), a will of copyholds was not a devise or bequest of lands or tenements within the 5th and 6th sections of the act. (See 7 East, 322).

Copyholds not within the Statute of Frauds.

The decisions, therefore, antecedent to the Statute of Frauds, were still applicable. According to those decisions, not only did an unattested paper writing, signed by the testator, operate as an effectual

What constitutes a will of personalty and copyholds.

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devise of copyholds, but testamentary papers, neither authenticated by the signature, nor even in the handwriting of the testator, were held to be sufficient, the same having been, during the life of the testator, put into writing by his direction. And, though the ground upon which copyholds were held, originally, not to be within the statute—namely, that the estate passed by the combined operation of the surrender and will—did not apply to equitable interests, which never could be the subject of a surrender, yet the well-known maxim, equitas sequitur legem, required that they should be governed by the same rule: *Tuffnell* v. *Page*, 2 Atk. 37; 2 P. W. 261, n.; *Carey* v. *Askew*, 1 Cox, 243.

As to incomplete papers.

But it was not always enough, in the execution of a will, that the general requirements of the law were satisfied; for, if the author of the paper in question had chosen to prescribe to himself a more formal or elaborate mode of execution, and afterwards neglected to comply with the prescribed formalities, the inference to be drawn from these circumstances was, that he had not fully and definitively resolved on adopting the paper as his will. [Thus a testamentary paper found in the custody of the deceased, written in his handwriting, and concluding with the usual words, "In witness," &c., but without subscription or seal, (the deceased having lived sixteen months after the date of the paper), was pronounced against as unfinished and abandoned: *Abbot* v. *Peters*, 4 Hagg. 380.] On this ground, the Prerogative Court did, in several instances, pronounce against the admission to probate of papers which the testator had signed, but had not proceeded to attest, as he had evinced an intention to do. Thus, in the case of *Walker* v. *Walker*, 1 Mer. 503, the circumstances were as follow:—The will was signed and sealed by the deceased, and had a clause of attestation, in these words—"Signed, sealed, and declared by me, the said (*name*), to be my last will and testament, in the presence of us, who attested the same in the presence of each other." There was no subscribing witness. The will was found rolled up in a piece of coarse paper, on which the deceased had written—"I sealed and signed my will, to have it to be witnessed the first opportunity I could get proper persons for it." The deceased lived twelve years after the date of the paper. The Prerogative Court decided against the alleged will, and this decree was affirmed, after much argument, by the Delegates, 15th February, 1805.

Paper rejected, for want of attestation.

So, in the more recent case of *Beaty* v. *Beaty*, 1 Add. 154, where the deceased, who died on the 21st of March, 1822, left a testamentary paper dated the 6th of June, 1820, signed by him, having an attestation clause in the following words—"Signed, sealed, and

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delivered, in the presence of," but which clause was not subscribed by any witnesses. A person who had attested a former will of the deceased, proved a conversation with him, in which the deceased said that he had destroyed the will formerly attested by him, and had made another (meaning, it should seem, the paper in question). Sir J. Nicholl said—"As the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, in his apprehension of it, till that operation was performed —the presumption of law is *against* a testamentary paper with an attestation clause not subscribed by witnesses." The learned Judge proceeded to observe, that the presumption against an instrument so circumstanced was a slight one, where the instrument, like that before the Court, was perfect in all other respects (*a*). Slight as it was, however, it must be rebutted by *some* extrinsic evidence of the testator intending the instrument to operate in its subsisting state, before it could be admitted to probate. In reference to the deceased's conversation with the attesting witness of the former will, the learned Judge observed, that the mere vague declarations of testators, that they have made their wills, are not always to be implicitly relied on, and can never, standing singly, supply proof of due execution, or, consequently, of what is to be taken in lieu of it. In common parlance, a man may well say, that he has made a will, when he has *written* a testamentary paper, though unfinished (*b*).

Distinction where the testator is prevented from performing the concluding act of authentication.

Where, however, the testator's design of perfecting the paper was frustrated by an inevitable event, such as sudden death or insanity, no inference of the absence of matured testamentary intention arose from the imperfect state of the paper, which, therefore, notwithstanding its defect, was received as the will of the deceased, provided it

(*a*) [In the case of *Doker* v. *Gett*, 2 Add. 42, there was no regular attestation clause, but only the word "witnesses," which the Court considered as raising a much slighter presumption.]

(*b*) These cases appear to have overruled some early decisions, in which imperfect papers have been admitted as wills, unless those decisions can be referred to the principle next adverted to in the text, which seems doubtful, as but little allusion is made in them to the point now so much regarded—whether the noncompletion of the instrument was the consequence of the voluntary neglect of the deceased, or of inevitable accident. See *Cobbold* v. *Baas*, 4 Ves. 200, n.; *Habberfield* v. *Browning*, Ib. In the case of *Roe* d. *Gilman* v. *Heyhoe*, 2 Blackst. 1114, an instrument which was signed only, was held to be a valid will for devising copyholds, (having been proved in the Ecclesiastical Court), though, in the testimonium clause, it was referred to as being under the hand *and seal* of the testator. From the evidence, however, it appeared that the testator had subsequently treated it as his will.

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fully disclosed his intended disposition. As in the case which arose on the will of the well-known William Huntingdon, where the facts were, that an attorney had taken down from the testator's own mouth his intentions respecting his property, and afterwards read them over to him. The draft so prepared was approved by the testator, and a fair copy directed to be made, and brought to him the next morning, to be executed as a will; but the testator died in the course of the night. Sir J. Nicholl held this circumstance, of the direction to the attorney to make a fair copy and bring it next morning for execution, to be conclusive of the testator having fully made up his mind on the subject of his will, and accordingly pronounced for the validity of the testamentary paper: 2 Phill. 213. See also *Carey* v. *Askew*, 1 Cox, 241.

What an adequate preventing cause.

In order to warrant the reception of the unfinished paper, it was not necessary that there should have been a physical impossibility of the testator's completing it before his dissolution; it was enough that the obstacle was such as to account for the noncompletion, without having recourse to the supposition of an immaturity or change of testamentary intention. Thus, where a person went to the office of his attorney, on the 10th of December, and gave him instructions for his will, promising to call and execute the will, when prepared, which he never did, though he lived to the 15th; but, as the deceased did not afterwards leave his house, the state of his health being such as to render his doing so inconvenient, though not impossible; and, as an anxiety expressed to the attorney, to conceal it from his (the deceased's) wife, supplied a reason for his not sending for the will to be executed at home, the Court pronounced in favour of the written instructions taken down by the attorney on the oral dictation of the deceased: *Allen* v. *Manning*, 2 Addams, 490.

Contents of the paper must be complete.

But this doctrine, in favour of imperfect papers, was only applicable where the defect was in regard to some formal or authenticating act, and not where it related to the contents of the instrument; for, if in its actual state the paper contained only a partial disclosure of the testamentary scheme of the deceased, the Court could not carry it into effect, even though its completion was prevented by circumstances beyond his control. And therefore, where a person, while dictating his will to an amanuensis, was stopped by sudden decease, or the rapid declension of his mental or physical powers, such paper could not be admitted to probate, as containing his entire will, without the most unequivocal testimony that the deceased considered it as finished; and the fact that the paper professed to dispose of the deceased's whole

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estate was not conclusive in its favour, because testators not unfrequently begin with such an universal disposition, and then proceed to bequeath specific portions by way of exception thereout. And the inference that the alleged will disclosed part only of the intended disposition, was strengthened by the fact of its not embracing persons who, from their intimate relationship to the deceased and from the contents of a prior revoked will, it was rather to be expected would have been primary objects of his consideration: *Montefiori* v. *Montefiori*, 2 Addams, 354. See also *Griffin* v. *Griffin* (*a*), 4 Ves. 197, n.

Presumption against unfinished papers.

In short, the presumption was always against a paper which bears self-evident marks of its being unfinished; and those who asserted its testamentary character were obliged distinctly to shew, either that the deceased intended the paper, in its actual condition, to operate as his will, or that he was prevented from completing it: *Reay* v. *Croucher*, 1 Hagg. 75; *S. C.*, 2 Id. 249; *Wood* v. *Medley*, 1 Id. 661; *Re Robinson*, Id. 643; [*Bragge* v. *Dyer*, 3 Hagg. 207; *Elsden* v. *Elsden*, 4 Hagg. 183; *Gillow* v. *Bourne*, Id. 192; *Tudor* v. *Tudor*, Id. 199, n.] (*b*) And the Prerogative Court did not grant probate of such defective papers without the consent or citation of the next of kin: *Re Adams*, 3 Hagg. 258.

Informal paper intended as a present will.

It ought to be observed, however, that among inchoate or unfinished testamentary papers was not one which was evidently intended to perform the office of a present will, (if the expression is admissible), though appearing by the language of its commencement (in which it is intitled a memorandum [or sketch] of an *intended* will) to have been originally designed as instructions for a more formal instrument: *Barwick* v. *Mullings*, 2 Hagg. 225; [*Hattatt* v. *Hattatt*, 4 Hagg. 211; *Tarre* v. *Castle*, 1 Curt. 303.]

3. *Execution and Attestation of Wills made since the Year* 1837 (*c*).

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Execution of wills made since 1837.

[By the stat. 7 Will. 4 & 1 Vict. c. 26, s. 9, it is enacted, "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot

(*a*) This case afforded two sufficient grounds for the rejection of the paper, viz.—1st, that it was not the whole will; and, 2ndly, that its completion was not prevented by inevitable circumstances.

(*b*) As to the contrary presumption in favour of a regularly executed and apparently complete will, vide *Shadbolt* v. *Waugh*, 3 Hagg. 570.

(*c*) ["Every will re-executed or republished, or revived by any codicil, shall, for the purposes of this act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." 7 Will. 4 & 1 Vict. c. 26, s. 34.]

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or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."]

Wills must be in writing, except in the case of soldiers and mariners.

[Thus, nuncupative wills are rendered invalid, except so far as the provision in the 11th section extends, by which it is enacted, "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act." It has been held, that a purser of a man of war comes within the description "mariner or seaman:" *Re Hayes*, 2 Curt. 338; and it should seem that the term "mariner or seaman" includes every person in her Majesty's navy, as well the admiral or commander in chief as a common seaman, *being at sea*, within the exception contained in the act: *Earl of Euston* v. *Lord Henry Seymour*, 2 Curt. 339. The exception in the 23rd section of the Statute of Frauds, as to "any mariner or seaman being at sea," has been held to apply to *merchant* seamen: *Morrell* v. *Morrell*, 1 Hagg. 51. It has also been held, on the construction of the words "any soldier being in *actual military service*," that the privilege is confined to those who are *on an expedition: Drummond* v. *Parish*, 3 Curt. 522.]

Publication not requisite.

[Any doubt that may have existed as to what might amount to a sufficient publication of a will is now removed by the 13th section, which declares, "that every will executed in manner hereinbefore required shall be valid without any other publication thereof."]

Mark, a sufficient signing.

[A mark made by a testatrix, and attested by two witnesses, her name not appearing, has been held to be a sufficient signing, under the stat. 7 Will. 4 & 1 Vict. c. 26, s. 9: *Re Bryce*, 2 Curt. 325. The making a mark by the witness has also been held to be a sufficient signing for the purpose of attestation: *Re Clark*, 2 Curt. 329; *Re Ashmore*, 3 Curt. 756.]

The signature must be at the foot or end.

[The will must now be "*signed at the foot or end thereof;*" the Statute of Frauds merely requiring that the will should be "signed." There have been several cases in the Prerogative Court, in which questions have arisen, whether or not the signature of the deceased could be considered to be at the foot or end. In *Re Woodington*, 2 Curt. 324, probate was allowed of a will concluding, "signed and sealed as and for the will of me, C. E. T. Woodington, in the presence of us, Thomas Hughes, Ellen Hughes." The Court, in referring subsequently to this case, said that the words "*of me*," made use of

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in this attestation clause, were important. In *Re Howell*, 2 Curt. 342, below the signature of the testator and of the witnesses, but before the execution, was written the clause appointing the executors. The Court allowed administration with the will annexed to pass to the residuary legatee, without the clause appointing the executors. In *Re Carver*, 3 Curt. 29, where a testator signed his name at the bottom of a printed form, ending on the second side of a sheet of paper, the will itself ending on the first side, probate was allowed to pass of the will as signed at the "foot or end thereof." See also *Re Bullock*, 3 Curt. 750. In *Re Powell* (for this and other cases, see Edwards's very useful Abridgment of Cases in the Prerogative Court under the New Statute of Wills, pp. 19 et seq.) a clause was added to a will immediately before execution; and this clause beginning parallel with, reached below the signature of the deceased and of the attesting witnesses, thus:—

"In witness whereof I have hereunto set my hand (by making a mark) this 18th September, 1844.

The mark

"and if any ×
money remains of Esther Powell,
after the legaces Witnesses, T. A. J. F.
ar paid to be equally divided betwixt my appointed executors and Thos. Goodge, of Notting Hill."

This was held to be at the end of the will, though not at the foot. In *Re Gore*, 3 Curt. 758, the dispositive part of the will was written on the first side of a sheet of paper, the second side was left blank, on the third side was a full attestation clause, and at the foot or end thereof was the signature of the testator and the subscription of two witnesses. The Court said, "By this will the *whole* of the deceased's property is disposed of; it is given to the wife, and she is named sole executrix; and, consequently, there is no reason to apprehend that the deceased intended to make any further bequest. If the whole of the property had not been disposed of, the Court might have thought that the will was provisionally executed, and that the deceased intended to reserve to himself the power of giving other legacies from time to time. The will cannot be said to be signed at the foot, but it may be said to be signed at the end. Under these circumstances probate of this paper may pass." In *Ayres* v. *Ayres*, 11 Jur. 417, the body of the will was written on the first side of a sheet of paper, leaving a blank space of about two inches at the bottom, and about the middle of the second side was written the attestation clause and signature. There were several

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alterations and interlineations in the body of the will; but there was no evidence to shew whether they were made before or after the signing. It was held, that the will was not properly signed at the foot or end thereof, according to the statute. The Court observed, distinguishing this case from the last, *Re Gore*, "On the face of the paper it is not duly executed; but it is said that there have been others in which the Court has granted probate of similar papers. The Court has certainly done that in some instances, which, perhaps, considering the words of the act of Parliament, it was hardly warranted in doing; but in most, if not all of those cases, there was not the least reason to suppose that the testator intended doing anything more to the paper; but in this case that depends upon circumstances, because there is no residuary clause in the will, and it is said, that, notwithstanding what is pleaded in the first article of the allegation, there may be some residue arising from the produce of the sale of the freehold, and therefore the deceased might have put in any disposition of this residue he thought proper after the execution. I have reason to know that in other quarters it is thought that this Court has strained the words of the statute as far as they will go. It certainly was the impression on the mind of the Court, that one of the principal reasons for requiring the signature to be at the foot or end of the will was to meet those cases, in which it had been held a sufficient signing if the name of the testator appeared on another part of the instrument, as at the beginning; but there are also other reasons for the enactment; to prevent, for instance, anything being done to the will after execution, or to prevent the whole of the will from being written after the signature and attestation. In this case there is nothing to shew that the will was written before the execution, either from any evidence which can be produced or from any circumstances explanatory of the course of the transaction, and without this I cannot grant probate of the paper." In the subsequent case of *Willis* v. *Lowe*, 11 Jur. 807, the Prerogative Court abandoned the distinction in regard to the disposition of the residue. In this case the body of the will was written on the first and second sides of a sheet of letter-paper, ending about two-thirds down the second side; there were no alterations or interlineations; the signature and attestation clause were on the third side, beginning at some distance from the top. Sir H. Jenner Fust observed: "There was nothing to prevent the attestation clause commencing at least on the second side; and it appears to me that it is impossible to hold the signing of the deceased to be at the foot or end of the paper. It is true that cases occurred in earlier times, in which the Court was

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disposed to act according to what may be called the equity of the statute, but the Court now feels itself under the necessity of keeping to the letter of the act, and so acted in the case which has been cited: and I do not think that the fact of there being here a bequest of the residue, and an appointment of an executor, will take this case out of the strict interpretation of the act of Parliament. I do not, however, go to the whole extent of the argument, that the attestation clause, or the names of the testator and witnesses, should follow the end of the will as near as possible; all that I am inclined to hold is, that there is nothing in this case to shew that the paper was in a finished and perfect state at the time when it is said to have been executed; and that I cannot say the deceased signed her name at the foot or end of this will. I am of opinion that the facts stated are not such as, if proved, would enable the Court to pronounce for the will; and I therefore reject the allegation." And in the recent case of *Smee* v. *Brye*, 12 Jur. 103, an allegation pleading circumstances fully accounting for the signature being at some distance from the termination of the will was rejected.]

As to signing by "some other person" for the testator, or by mark.

[In regard to the words that follow, viz. "by the testator, or by some other person in his presence and by his direction," Mr. Jarman has the following observations in his Treatise on Wills, Vol. 1, p. 101:—"Where a testator is unable to write from ignorance, perhaps a mark is to be preferred to a signature by the hand of another, as being the more usual mode of execution by illiterate persons; for in regard to this and all other particulars the prudent course is, to make the execution of the will conform as much as possible to the testator's ordinary mode of executing instruments. Where the will is signed by a third person on behalf of the testator, the signature, of course, should be in the name of the testator, and not in that of the amanuensis, who should merely be designated in the memorandum of attestation; where it would be proper (though not necessary) that the peculiar mode of execution should be stated. If, however, (as sometimes occurs), the amanuensis inaccurately signs the will in his own name, the execution is nevertheless good, as the statute has not exacted correctness in this particular, its requisition being merely that the will be signed *by* the testator, &c. (not that it be signed *in the name of the testator*); and any signature intended to authenticate the instrument would unquestionably be sufficient for this purpose." In *Re Clark*, 2 Curt. 329, the testator, being too ill to sign his will, requested the drawer thereof to sign it for him, which he did in his own name, not in that of the testator, having the statute

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7 Will. 4 & 1 Vict. c. 26, before him, and intending to follow its provisions, thus:—

"Signed on behalf of the testator, in his presence and by his direction, by me,

"C. F. Furlong,

"Vicar of Warfield, Berks."

"The above signature was made for and acknowledged by the testator, in the presence of us, whose names are hereto subscribed,

"Mary Butler × her mark,

"Ann Clark."

The witness, Ann Clark, was the wife of the deceased, and had a legacy under the will, and was appointed the executrix according to the tenor thereof. Sir Herbert Jenner:—"The statute allows a will to be signed for the testator by another person, and it does not say that the signature must be in the testator's name; here, this gentleman, at the testator's request, signed the will for him, not in the testator's name, but using his own name. I incline to think that this is a sufficient compliance with the act; the executrix is a good witness, but will lose her legacy." Probate granted.]

Signature for the testator may be by one of the attesting witnesses.

[In *Re Bailey*, 1 Curt. 914, Sir Herbert Jenner held, that a signature, by the direction of the testator, made by one of the two attesting witnesses, is valid under the stat. 7 Will. 4 & 1 Vict. c. 26, s. 9. The same question was subsequently raised in a more formal manner, in the recent case of *Smith* v. *Harris*, 1 Robert. 262, in which the circumstances were similar to those of the last-mentioned case, viz. the signature to the will was not written by the testatrix, but by another person, in her presence and by her direction, and such person was one of the attesting witnesses; and it was contended against the will, that this was not a good execution, the counsel relying on an opinion expressed in Mr. Sugden's Essay on Wills, p. 38, that "it could not be the intention of the Legislature to require the testator to acknowledge the signature of his will by another person to the very person who had signed it for him;" that it is inconsistent that a person should attest his having *seen himself* do an act. But the fallacy here is in assuming that the act is an act of his own volition, and not of that of the testator. In signing the testator's name, he is as much a mere instrument as a pen would be in the testator's hand. His attesting, therefore, that he signed the will with the testator's name by the testator's directions, amounts to precisely the same thing as attesting that he saw the testator sign it himself, that is, with his own hand. Accordingly the will was

admitted to probate, Sir H. Jenner Fust observing, "I must adhere to the opinion I expressed '*In the goods of John Bailey*,' for no substantial difference has been pointed out to me. I am not satisfied, notwithstanding Mr. Sugden's opinion, which I considered at the time, that I was wrong. The witness here attests the *direction* of the testatrix, and that direction amounts to an acknowledgment, as was said by Dr. Addams."] EXECUTION OF WILLS MADE SINCE 1837.

[In *Re Regan*, 1 Curt. 908, the testator signed his will in the presence of one witness, and afterwards acknowledged his signature in the presence of three witnesses present at the same time who attested it in his presence. Sir Herbert Jenner said, "It has been suggested that the word 'acknowledged' ('such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time') refers only to a signature when made for the testator by another person; but I am of opinion, that the acknowledgment by the testator of his own signature, or the signature made by some other person in his presence and by his direction, is sufficient, if attested as required by the act." Administration with will annexed granted. In those cases, then, where the signature is made by the testator, but not in the presence of the attesting witnesses, a question of some difficulty often arises as to what shall be a sufficient acknowledgment of it by him in their presence. In *Re Warden*, 2 Curt. 334, the testatrix signed her will, and on a subsequent day sent for two witnesses to attest the same; upon their arrival they said that they were come for the purpose of signing their names as witnesses to her will, which was then produced, upon which the testatrix said, "I am glad of it, thank God!" and they subscribed the will as witnesses; this was held to be a sufficient acknowledgment of her signature by the deceased, under 7 Will. 4 & 1 Vict. c. 26, s. 9. In *Gaze* v. *Gaze*, 3 Curt. 451, the testator told two of the three witnesses that he was going to sign his will, produced his will signed and sealed, and directed them to put their names to it as witnesses. It did not exactly appear whether the words he used were "Put your names below mine," or pointed out the place where their names were to be signed; this was held to be a sufficient acknowledgment of the signature, the Court being satisfied (although there was no express evidence of the fact) that the signature was in the handwriting of the testator. See also the cases of *Blake* v. *Knight*, 3 Curt. 547; *Keigwin* v. *Keigwin*, 3 Curt. 607; *Re Ashmore*, 3 Curt. 756; in all which there was held to be a sufficient acknowledgment.] What a sufficient acknowledgment.

[A statement of some of the cases in which the Court has not been Cases in which

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acknowledgment held insufficient.

satisfied that there was such an acknowledgment as the statute requires, may further elucidate the subject. In *Re Rawlings*, 2 Curt. 326, the testatrix signed her will, not in the presence of witnesses, and subsequently produced her will before two witnesses, and said to them, "Sign your names to this paper." This was held not to be an acknowledgment of her signature under the 9th section of stat. 7 Will. 4 & 1 Vict. c. 26. In *Re Harrison*, 2 Curt. 863, probate was refused of a paper which was produced by the deceased to three witnesses, who subscribed their names thereto. The deceased did not state at the time that the paper was her will, neither did she sign it in their presence, or acknowledge any signature to it. Two of the witnesses did not observe any signature to the paper, but one deposed that she observed the signature of the deceased. The Court was of opinion, that this was not a sufficient acknowledgment of the signature to two witnesses present at the same time. But in *Re Ashmore*, 3 Curt. 756, under very similar circumstances, the decision of the Court was different. There the testatrix produced a codicil, all in her own handwriting, to two witnesses, and requested them to sign, which they did; nothing was said by the deceased as to her signature, or as to the paper being testamentary, but one of the witnesses saw and recognised the signature of the deceased made at the end of the last line of the paper: the Court held this to be a sufficient acknowledgment. In *Ilott* v. *Genge*, 3 Curt. 160, where a testator requested two persons present at the same time to sign a paper for him, which they did in his presence, the paper being so folded that the witnesses did not see any writing whatever on it; the testator did not state what was the nature of the paper in question, which on his death was found to be his intended will, with the attestation clause as follows:—"Signed, sealed, and delivered in the presence of us, this 8th day of September, 1841., S. H.—H. E.—J. C.:" this was held not to be entitled to probate, the provisions of the 9th section of the 7 Will. 4 & 1 Vict. c. 26, not having been complied with. In the course of his judgment, Sir H. J. Fust observed:—"Under the Statute of Frauds, it was sufficient if the paper was acknowledged to be a will; but it is now enacted, in express terms, that the signature shall be acknowledged, it would seem to require that the witnesses should see the signature; that they should know that the paper was signed at the time, a fact which could only be known by seeing the testator sign, or hearing him say that he had signed, and 'that was his signature:' it might be a question whether a declaration by the deceased that he had signed the paper would be sufficient for the purpose, but that point does not arise here. How is it possible that

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a signature should be acknowledged (for it is not the will, but the signature, which is to be acknowledged), unless the signature is exhibited to the witnesses? Now the construction which I should be inclined to put upon this clause, is, that the production of the will with the signature to it, and requesting the witnesses to attest, and their attesting and subscribing the will, would be sufficient." This decision was affirmed in an appeal to the Privy Council, 20th February, 1844: 1 Robert. 14, n. (*a*). In the case of *Hudson* v. *Parker*, 1 Robert. 14, two persons subscribed a paper in the presence of the testator and of each other, the testator having previously in their joint presence acknowledged the said paper to be his will. The witnesses did not see the testator sign his name to the paper, nor did they at the time of subscribing their names to it see his signature, the writing upon the paper being purposely concealed from them. Upon the testator's death, his signature was found at the end of the paper. A distinction was contended for between this case and *Ilott* v. *Genge*, that there the testator did not acknowledge the paper to be his will, while in this case there was a positive direct acknowledgment of the paper as his will by the deceased. Dr. Lushington, sitting as surrogate for Sir H. J. Fust, after a minute examination of the question, and an elaborate consideration of the construction of the new Statute of Wills, particularly the 9th section, observing, that "the present statute was intended to effect the same object as to wills of personal estate, as that effected as to wills of real estate by the Statute of Frauds, and to secure further objects, especially that the testamentary act to be done should be deliberate, and that no doubt should exist as to its finality; and that the safeguards provided by the act are contained in the 9th section:" held, that there was not any broad distinction between this case and *Ilott* v. *Genge*, and that this will was not executed according to the exigency of the statute, on three distinct grounds: "first, there is no proof that the signature was affixed prior to the subscription of the witnesses; secondly, if, from the circumstances, such fact is to be presumed, it was not made in the mental presence of the witnesses, nor indeed is there any proof that they were present at all; lastly, because the witnesses never saw, or indeed could see the signature, of which there was no acknowledgment unless constructive."]

Acknowledgment by witness not sufficient.

[It has been held that the power of acknowledging his signature, given by the act to the testator, does not extend to the witnesses: *Moore* v. *King*, 3 Curt. 243.]

Testator must sign *before* the witnesses.

[It has also been decided in several cases that the signature of the testator must be made or acknowledged *before* the witnesses sign,

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and that if the will is signed by the testator *after* the witnesses have signed, it is not well executed: *Re Olding*, 2 Curt. 865; *Re Byrd*, 3 Curt. 117; *Cooper* v. *Beckett*, 3 Curt. 648. In this last case, Sir H. J. Fust observed: "By the 9th section of the act of Parliament, it is absolutely necessary that the deceased shall have signed the will, or have acknowledged his signature in the presence of two witnesses, present at the same time, and that they should have attested it in the presence of the testator, though not of each other. The interpretation which the Court has put upon the section is, that the testator must sign or acknowledge his signature before the witnesses attest, and that if the witnesses attest before the signature of the deceased is affixed to it, the will is not duly executed within the provisions of the act. The words of the section are very precise, and I think it would be attended with dangerous consequences if the Court were to hold a will valid which has been signed in the presence of two witnesses, who have attested it before the signature of the testator was affixed to the will; for where is the Court to draw the line? Suppose the witnesses attested an hour before the testator signed, or a day, or a week, or any other time, where is the Court to stop, if it gave a latitude of construction to this section of the act?"]

Meaning of the word "present."

[We have seen that in the case above cited of *Hudson* v. *Parker*, 1 Robert. 14, Dr. Lushington objected that the signature of the testator "was not made in the *mental* presence of the witnesses." The meaning of the word "mental" here is explained by the following passage of his judgment: "As to the plain meaning of these words, 'that the signature of the testator shall be made in the presence of two witnesses,' will the statute be satisfied, if the signature be made in their presence, if they are in ignorance of the fact? I am of opinion, under such circumstances, that the statute is not complied with. It is obvious, that the solution of this question must mainly depend on the meaning which the Legislature intended to convey by the use of the word '*presence*,' in this and in the other clauses of the statute. What could possibly be the object of the Legislature, except that the witnesses should see and be conscious of the act done, and be able to prove it by their own evidence: if the witnesses are not to be mentally, as well as bodily, present, they might be asleep, or intoxicated, or of unsound mind." In the case of *Newton* v. *Clarke*, 2 Curt. 320, the testator signed a codicil while lying in bed, the two witnesses who attested the codicil being in the room; the curtains, though open on both sides, being closed at the foot of the bed, one of the witnesses, as he was standing by the fire, could not actually see the testator sign his name; and that witness signing upon a small

table placed between the foot of the bed and the fire where the curtains were still closed, the testator might not have seen him sign. It was held that the testator and the witness signed their names in the presence of each other, as required by the stat. 7 Will. 4 & 1 Vict. c. 26, s. 9, Sir H. Jenner Fust observing, "As far as the words of the act go, I should be of opinion, without reference to the cases, that the witness, being in the same room, was present. The object of the act is to prevent the substitution of another paper, and that no fraud should be practised on the deceased. I should, therefore, hold that this is a sufficient attestation in the presence of the testator, and a sufficient compliance with the act of Parliament. The several cases referred to, were questions under the Statute of Frauds, where wills were attested in a different room from that where the testator was. In this case, no suspicion of fraud can be suggested; the party employed the residuary legatee to prepare the codicil, and he will be a sufferer to the extent of the legacy. I am of opinion, that, under the act, where a paper is executed by the deceased in the same room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign." But if the signature be made in another room, the position of the parties must be such as to render them visible to each other. Thus, in *Re Ellis*, 2 Curt. 395, motion for probate of a will signed by the testator, a barrister-at-law, in the presence of two witnesses, present at the same time, who admitted that they attested the paper in another room, separated from the deceased's bedroom by a passage, both doors being open, so that they could hear him breathe, but could not have been seen by and could not see him, was rejected. And in *Re Colman*, 3 Curt. 118, motion for probate was rejected under similar circumstances, Sir H. J. Fust observing, "Had the deceased been in such a situation that he might have seen the witnesses subscribe their names, it might have been held to have been done constructively in his presence, as in the case where a lady sat in her carriage whilst the will was attested in a solicitor's office, in which she might have seen the witnesses sign their names: *Casson* v. *Dade*, 1 Br. C. C. 98. Here it was impossible for the deceased to see the witnesses." In *Re Piercy*, 1 Robert. 278, the Court held, that in the case of a testatrix totally blind but in full possession of her mental faculties, it must appear that, though she was blind, she could, had she had her eyesight, have seen the witnesses sign. This does not seem to be quite reconcileable with the doctrine of mental presence above mentioned. In the case of a blind testator, the consciousness of the act done, neces-

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sary to constitute the mental presence required, would hardly be much increased by the distinction taken here by Sir H. J. Fust.]

Simultaneous presence of the witnesses.

[In *Re Allen*, 2 Curt. 331, the deceased signed her will by a mark, in the presence of one witness, who subscribed the will as attesting it, and on a subsequent day she acknowledged her signature in the presence of that witness and of another, who also subscribed the will, but the former witness did not again subscribe the will; probate was refused, Sir H. Jenner observing, "The act requires that the signature 'shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and that such witnesses shall attest and shall subscribe the will in the presence of the testator.' Here the deceased made her mark in the presence of one witness only, who attested it, and afterwards, on a subsequent day, acknowledged her signature in the presence of the same witness, who did not then subscribe it, and of another who did. The natural construction of the words of the act, which are in the future tense, seems to be, that when the signature is made or acknowledged, the witnesses shall then attest it; not one at one time, and one at another." In *Re Simmonds*, 3 Curt. 79, the circumstances were almost identical with those of the last case, and the motion for probate was rejected on the same ground, viz. "that the intention of the Legislature was, that there shall be a signing or acknowledgment in the presence of two witnesses present at the same time, and that they shall both then attest it." In the case of *Moore* v. *King*, 3 Curt. 243, already mentioned (ante, p. 79), a testator signed a codicil in the presence of a witness (his sister), who, at his desire, attested and subscribed it. On a subsequent day, when his sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying, in the presence of both parties, and pointing to his signature, "This is a codicil, signed by myself and by my sister, as you see; you will oblige me if you will add your signature, two witnesses being necessary." That party then subscribed in the presence of the testator and of his sister, the latter, who was standing by him, pointing to her signature, and saying "There is my signature, you had better place yours underneath;" she did not, however, re-subscribe. It was held that the instrument was not sufficiently attested under 7 Will. 4 & 1 Vict. c. 26, s. 9.]

"Attest and subscribe."

[In *Hudson* v. *Parker*, 1 Robert. 14, Dr. Lushington, after quoting the words of the 9th section, "such witnesses shall attest, and shall subscribe the will in the presence of the testator," observed: "Here are two things which the witnesses are to do; they

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are to *attest*, and they are to *subscribe*—mark the words—shall *attest and shall subscribe:* the word 'shall' is repeated; subscription alone will not do, it will not satisfy the statute; and it is a well-established rule, that you are to give, if possible, a rational meaning to every word of a statute. Then, if '*attest*' means something more than *subscription*, what does it mean? '*To attest*' is to bear witness to a fact. Take a common example: a notary public attests a protest; he bears witness, not to the statements in that protest, but to the fact of the making of those statements; so, I conceive, the witnesses in a will bear witness to all that the statute requires attesting witnesses to attest, namely, that the signature was made or acknowledged in their presence. The statute does say, 'that no form of attestation shall be necessary;' still the witnesses must attest, although the outward work of attestation may be subscription only. If more be wanted to explain the meaning of the word '*attest*,' the old form of attestation clause will show that it comprehended more than bare subscription of the will itself. It has been held, in the execution of a power, that subscription is merely the form of bearing witness to the facts required by the instrument creating the power. It was so held in *Doe* d. *Spilsbury* v. *Burdett*." Dr. Lushington, after intimating his opinion that there is a great difference in the importance of the two acts "*subscribing in the presence of the testator*," and "*signing or acknowledging a signature in the presence of the witnesses*," inasmuch as the witnesses are to see the signature made or acknowledged, because they are to attest it, but are to subscribe in the presence of the testator for the completion of the instrument, and not in order that the testator should bear witness of their subscription as they are to bear witness of his; the witnesses may equally bear witness to their subscription in his presence, although *he* does not see them sign, but they cannot equally depose to the signature of the testator being made or acknowledged in their presence unless they see the act; thus proceeds:—"It may, therefore, be that the words 'subscribe in the presence of the testator,' may be satisfied with less stringent proof; that the cognisance of the subscription of the witnesses may not be so absolutely necessary, or may be inferred by bodily presence; but it would be very difficult to apply this construction to the prior part of the section—for that is the vital part of the whole transaction, especially when the will is not in the testator's handwriting. Here I think there must be an actual and not a constructive compliance with the statute. I think my opinion is somewhat fortified by what fell from two of the Judges in the cited case of *Doe* d. *Spilsbury* v. *Burdett*, 6 Man. & Gr. 386; 10 Cl. & Finn. 340,

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and I will take the opinions of Justices Patteson and Coleridge, both of which, although the two Judges came to different conclusions, seem to assist my view. Justice Coleridge says, (p. 419), 'To attest, in common language, means either to call to witness, or to witness. Any one reading the sentence in the power now under consideration, who was not conversant with legal decisions, would understand it to imply that the execution was to take place in the presence of three credible persons, who were not to be merely present, but present as witnesses, and taking cognisance of what was done.' This is in the very teeth of the argument, that a witness may be present and not cognisant of what is done. 'If such a person had been shewn the fifth section of the Statute of Frauds, the written law which makes a provision in a matter of all others the most analogous to the present—the execution of ordinary wills in writing, which are, in truth, but instruments framed in the exercise of a statutory power—he would not only be confirmed in his conclusion, but be led to think that the witnesses, by writing their names, had perhaps done something more than was strictly necessary; for he would have found, that where signing by the witnesses as well as merely witnessing was required, the Legislature, in language cautiously and technically framed, had said that they should not only attest, but subscribe, the instrument. He could not doubt that those who framed that clause, had considered that attestation and subscription to be different things, the latter being something superadded to the former.' Mr. Justice Coleridge here gives a direct meaning to the word 'attestation' *cognisant of the transaction*, and the question is, how can a man be cognisant of that of which he knows nothing? I now come to what is said by Mr. Justice Patteson, and I will here say, that I consider him as an authority of the highest character, for I know of no judge who brings a more powerful mind or a greater store of learning to bear on any legal question. He says, (p. 394) 'The first question which arises appears to me to be, what is the meaning of the word 'attested?' Now the fair meaning of the previous words, 'in the presence of three or more credible witnesses,' must be, that three or more credible persons should see what is done; not merely that they should be present, without having their attention drawn to what is done; therefore, the word '*attested*,' if it have any meaning at all, must import something more than merely being present and seeing what is done.'" In *Re Mead*, 1 Notes Eccl. Cas. 456, where an attesting witness to a will being unable to write, the other attesting witness (since deceased) wrote her name for her, it was held that as both the witnesses had not 'subscribed,' the requisites of the act had not been complied with. See to the same effect *Re White*, 2 Notes Eccl. Cas. 461, where a man

subscribed both his own name and his wife's as witnesses. In *Hooley* v. *Jones*, 2 Notes Eccl. Cas. 59, where a testator signed his will by a mark in the presence of two witnesses, one of whom then signed the will as a witness and the other witness did not then sign, but had signed previously to execution in the following manner, not, as appeared upon the evidence, as an attesting witness, but to shew that he was the writer of the will, 'this was wrote by Wm. Pritchard, shopkeeper,' Sir H. J. Fust held 'that the evidence was not sufficient to support the will.'] EXECUTION OF WILLS MADE SINCE 1837.

[In regard to the concluding words of the 9th section, "no *form* of attestation shall be necessary," as many persons, thence inferring that an attestation clause was unnecessary altogether, have in writing a will entirely omitted it, it may be proper to state, that where the attestation clause is not sufficiently full to shew that the requisites of the act have been complied with, the registrars of the Prerogative Court, (agreeably to the directions of the Judge), require an affidavit from the attesting witnesses or one of them, in which the circumstances of execution must be set forth; if these circumstances are in compliance with the directions of the statute, probate passes in common form. Where there is no attestation clause or a defective one, and evidence that the requisites of the statute have been complied with cannot be procured, the presumption of law will come in. In *Burgoyne* v. *Showler*, 1 Robertson, 5, it was held, that if upon the face of a will, to which there is no memorandum of attestation, there be the signature of the testator at the foot or end thereof, and the subscriptions of two witnesses, if these persons were dead, the law would presume the will to be duly executed; if they were utterly forgetful of all the facts, the presumption of law would be the same; that if the witnesses profess to remember the transaction, and state that the will was not duly executed, and this negative evidence be not rebutted, by shewing that the witnesses are not to be credited, or that upon the statement of the fact their memories are defective, the will must be pronounced against; and that, in the absence of all evidence, the inference of law is, that alterations on the face of a will were made *after* the execution of the will. On this subject see also, *Gove* v. *Gawen*, 3 Curt. 151; *Pennant* v. *Kingscote*, 3 Curt. 642; *Re Ayling*, 1 Curt. 913; *Re Noyes*, 4 Notes Eccl. Cas. 284, and other cases collected, Edwards' Abridgment, 53 et seq.] Attestation clause.

[From the circumstance that the word used in the act is merely "witnesses," not "credible witnesses," taken together with the express provision of the 14th section, that if any person who shall attest the execution of a will shall, at the time of the execution Whether the omission of "credible" in the statute qualifies lunatics or other

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thereof or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid, it has been supposed that the act not only qualifies persons who have been rendered infamous by conviction for crime to be attesting witnesses, but also lunatics, idiots, or persons mentally incapable from intoxication or otherwise. Any conclusion, however, grounded upon such a supposition appears to be clearly fallacious, on the ground of the distinction taken by Dr. Lushington, in the case of *Parker* v. *Hudson*, 1 Robertson, 14, (see ante, p. 80) between mere bodily presence and mental presence, the statute (upon this construction) requiring the witnesses to be *mentally* present, which persons suffering under mental aberration, from whatever cause, cannot possibly be.]

persons mentally incapable.

Incorporation of other instruments in a duly executed will or codicil.

[The question of incorporating other papers in the probate of wills of personalty has been already considered (ante, p. 9, caseo f *Sheldon* v. *Sheldon*). The following cases are also authorities on this subject. In *Re Countess of Durham*, 3 Curt. 57, probate was granted of two instruments, as together containing the will of the deceased; a duly executed will referring to the revoked will of her husband deceased (not in her possession at the time) so particularly that there could be no mistake as to its identity. In *Re Dickens*, 3 Curt. 60, reference being made in a will to a deed, the Court, upon the principle upon which it acted in the last case, held this deed to be part of the testator's will. In *Re Willesford*, 3 Curt. 77, probate was granted of an unexecuted paper referred to in the will as "the paper hereunto annexed," and attached thereto by a pin. One of the points raised in the case of *The Countess Ferraris* v. *The Marquis of Hertford*, 3 Curt. 468, belonged to this subject. Lord Hertford, by a will dated in 1823, directed that future codicils signed by him should be considered as part of his will, whether such codicils were witnessed or not. The testator had also made several codicils to the said will, some duly executed, others only signed by him. Subsequently to the 1st of January, 1838, he made and signed a codicil (B.), but the same was not duly executed. Subsequently to this, by a codicil (C.), duly executed and attested, he ratified and confirmed his will and "*codicils*." It was held, that the codicil (B.) was not so identified with (C.) as to be ratified by or incorporated with (C.), the word "*codicils*" being more completely and properly applicable to the codicils made previously to the 1st of January, 1838. In this case the Court observed, that an instrument confirming by reference a will and codicils can have no *prospective* operation; that is, can only apply to papers already in existence.

For other cases in the Ecclesiastical Court, on this subject, see Edwards' Abridgment of Cases in the Prerogative Court, pp. 61—67.] EXECUTION OF WILLS MADE SINCE 1837.

VI. Revocation.

1. *By Marriage and the Birth of Children.*

REVOCATION.

Under the old law, where a feme sole, having made a will, married, her will was revoked, and seemed, by the better opinion, to continue so, even after the determination of the coverture, though she might happen to be discovert at the period of her death: *Forse and Hembling's case*, 4 Rep. 61, 1 And. 181; *Cotter* v. *Sayer*, 2 P. W. 624; *Doe* v. *Staple*, 2 T. R. 695. See also *Hodsen* v. *Lloyd*, 2 B. C. C. 533 (*a*). Will of feme sole revoked by marriage.

The marriage of a man, however, had no such revoking effect, because it did not take away his testamentary capacity, and probably because, too, the law had created for the wife a provision by means of dower, of which the will of her husband could not deprive her (*b*); nor did the birth of children alone revoke a will made after marriage, since a married man must be supposed to contemplate the having children; and the circumstance that the testator left his wife enceinte, without knowing it, was held not to impart to the birth of such posthumous child any revoking operation: *Doe* v. *Barford*, 4 Mau. & Selw. 10. Not that of a man.

Marriage *and* the birth of children conjointly, however, revoked a will either of real or personal estate, these circumstances producing such a total change in the testator's situation as to lead to a presumption that he could not intend a disposition of property previously made to continue unchanged. This rule [borrowed from the civil law, see Lord Kenyon's judgment in *Doe* v. *Lancashire*, 5 T. R. 58, and 1 Jarm. Wills, 107, n. (*c*)] was applied by the Ecclesiastical Courts to wills of personal estate at an early period: *Overbury* v. *Overbury*, 2 Show. 242; *Lugg* v. *Lugg*, 2 Salk. 592; *Brown* v. *Thompson*, 1 Marriage and birth of child revoked.

(*a*) In this case it was held, that a power in a marriage settlement to the lady *after* the marriage to devise, was not well executed by a will made before marriage.

(*b*) This reasoning only applied to real estate, but the rule, it should seem, extended to wills of personalty. In the case of *Johnston* v. *Johnston*, 1 Phill. 447, Sir J. Nicholl held, that a will of personalty was revoked by the birth of children, coupled with circumstances, the chief of which appears to have been that of the testator having prepared the outline of a new will differing from the former. The recent act of 3 & 4 Will. 4, c. 105, stated post, places dower under the absolute dominion of the husband.

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Eq. Ca. Ab. 413, pl. 15; *Eyre* v. *Eyre*, 1 P. W. 304, n.; and cas. cit. 2 Eden, 266, 1 Phill. 478; and was more recently and reluctantly extended to devises of freehold estates, its application to which had been previously thought to be precluded by the Statute of Frauds; (see *Parsons* v. *Lanoe*, 1 Ves. sen. 192; *Gibbons* v. *Caunt*, 4 Ves. 848); but the case of *Christopher* v. *Christopher*, Dick. 445, cit. 4 Burr. 2182, which occurred in 1771, and another decision which speedily followed, (*Spragge* v. *Stone*, cit. Doug. 35), closed all controversy on the point. The case of *Christopher* v. *Christopher* also shewed that the revocation was not confined to the case of an unmarried testator, but also took effect where he was a married man, who survived his wife, married again, and had issue by his second wife. The circumstance that the child was posthumous did not neutralise the revoking effect of its birth, though the expectation of such birth was never disclosed to the testator, as the doctrine did not suppose that, in every particular instance, an intention to revoke actually existed; but it annexed to the will a tacit condition that the party did not intend it to come into operation if there should be a total change in the situation of his family: *Doe* v. *Lancashire*, 5 T. R. 49. [In the case of *Marston* v. *Roe* d. *Fox*, 8 Ad. & E. 14, in the Exchequer Chamber, Tindal, C. J., in delivering the judgment of the Court, said, "We all concur in the opinion that the revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself, and, consequently, that no evidence of the testator's intention that his will should not be revoked is admissible to rebut the presumption of law."]

Rule applied to married testators.

Birth of posthumous child.

Whether child must have sprung from future marriage.

It was never decided, whether, to produce revocation, the children must have sprung from the subsequent marriage, or it was sufficient that a testator had future children of an existing marriage, survived his wife, and then married again, but had no children by the second wife. In *Gibbons* v. *Caunt*, 4 Ves. 848, Lord Alvanley inclined to the conclusion that the order of the events made no difference, and that the will was equally revoked in either case.

Provision in will for wife and children prevented revocation.

Marriage and the birth of issue did not absolutely, but merely presumptively, produce revocation; and the presumption might have been repelled by circumstances demonstrative of a contrary intention on the part of the testator. The best possible evidence of this was a provision in the will itself for the future wife and children, which, whatever might be its amount, unequivocally shewed that the testator contemplated the possibility of his standing in the marital and parental relations: *Kenebel* v. *Scrafton*, 2 East, 530. Indeed, a provision

for the children alone, was clearly sufficient, because the birth of children necessarily supposes marriage; but the case of *Brown* v. *Thompson*, 1 Eq. Ca. Ab. 413, pl. 15, to the effect that a provision for the wife, exclusively of children, would negative the presumed revocation [seems to be overruled by the case of *Roe* d. *Fox* v. *Marston*, 8 Ad. & Ell. 14, which decided that a provision for the wife alone did not negative the presumed revocation.]

Also provision by settlement.

In the Ecclesiastical Courts, it was even held, that the will remained unrevoked where the wife and children were provided for by settlement: *Talbot* v. *Talbot*, 1 Hagg. 705; *Johnston* v. *Wells*, 2 Hagg. 561 (*a*).

As to will disposing of less than whole estate.

It was never decided whether the rule for presuming a revocation would apply where the will disposed of less than the whole estate, though the reported cases supply the negative opinions of Lord Mansfield (*Brady* v. *Cubit*, Doug. 31) and Lord Ellenborough (*Kenebel* v. *Scrafton*, 2 East, 541). Supposing this to be clear, would a will, which actually, though not professedly, disposed of the testator's entire estate, as where there were particular gifts sufficient to absorb the whole, but no residuary disposition, have been considered as falling within the principle? [In *Marston* v. *Roe* d. *Fox*, 8 Ad. & Ell. 14, in the Court of Exchequer Chamber, Tindal, C. J., expressed an opinion (in reference to the argument that the descent of an after-acquired estate upon the child prevented the revocation of the will), that the condition annexed to the will had reference to the existing state of things at the time the will was made, though, as in that case the Court considered that only the legal estate descended upon the child, the point did not arise.]

No revocation where its only effect would have been to let in pre-existing child.

It is important to observe, that marriage and the birth of a child or children revoked a will [under the old law] only where the effect of throwing open the property to the disposition of the law would have been to let in such after-born child or children; for, if it would have operated for the exclusive benefit of a pre-existing child, the ground for subverting the will evidently failed. Thus, where a testator, having a son, made a will, married again, and had issue, the will was not revoked as to real estate, since the revocation would have had no other effect than that of causing the lands (supposing them descendible according to the course of the common law) to descend to the pre-existing son, who would necessarily have been senior to every child of

(*a*) In this case it was a second marriage, and other circumstances were adverted to, but the main stress was on the settlement provision.

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the subsequent marriage. Thus, in the case of *Sheath* v. *York*, 1 Ves. & Bea. 390, a testator, having a son and two daughters, devised his real and personal estate to be sold for payment of his debts and for the benefit of these children. The testator was at that time a widower, he married again, and had issue one child. On a bill filed by the creditors for a sale, the question was raised whether the will as to the real estate was revoked; Sir W. Grant held that it was not. "In all the cases," said his Honor, "the will has been that of a person who, having no children at the time of making it, has afterwards married, and had an heir born to him. The effect has been to let in such after-born heir to take an estate disposed of by a will made before his birth. The condition implied in those cases was, that the testator, when he made his will in favour of a stranger or more remote relation, intended that it should not operate if he should have an heir of his own body. In this case, there is no room for the operation of such a condition, as this testator had children at the date of the will, of whom one was his heir apparent, who was alive at the period of the second marriage, of the birth of the children by that marriage, and of the testator's death. Upon no rational principle, therefore, can this testator be supposed to have intended to revoke his will on account of the birth of other children, *those children not deriving any benefit whatever from the revocation*, which would have operated only to let in the eldest son to the whole of that estate, which he had, by the will, divided between the eldest son and the other children of the first marriage."

The reasoning of the Master of the Rolls extends only to cases in which the heir is among the pre-existing children; and it is probable that the revocation would have taken effect, notwithstanding the existence of such children, where the consequence of intestacy would have been to cast the estate upon one of the *subsequently born* children (being an eldest or only son), or upon the children of both marriages (the whole consisting of daughters). And this conclusion is strongly aided by the circumstance, that, in regard to personal estate, which is distributable among all the children pari passu, it was well settled, that a will was revoked by a subsequent marriage and birth of children, notwithstanding the prior existence of children: *Holloway* v. *Clarke*, 1 Phill. 341. See also *Gibbons* v. *Caunt*, 4 Ves. 849; *Wright* v. *Netherwood*, 2 Evans's Salk. 593, n. In the preceding observations it has been assumed that the application of the doctrine under consideration caused intestacy, but this was not necessarily the case; for its effect might be to revive a prior

Existence of prior children did not prevent revocation as to personalty.

uncancelled will, which contained a provision for the wife and children, protecting it from the revocation which the marriage and the birth of children produced on the subsequent will.

Effect of children dying in testator's lifetime.

At one period it appears to have been supposed, that, if the child or children, whose birth had revoked or contributed to revoke the will, died in the lifetime of the testator, this event restored its efficacy; the reasoning being founded on a fancied, but evidently mistaken analogy to the case of a will whose potential operation has been restored by the destruction of a subsequent revoking or inconsistent will: *Wright* v. *Netherwood*, 2 Evans's Salk. 593, n., 2 Phill. 266, n. The latter doctrine, however, is evidently a simple consequence of the ambulatory state of a will during the testator's lifetime, and stands upon grounds that have no application to the class of revocations under consideration; and therefore it has been in later times most properly adjudged, that a will once revoked by marriage and the birth of a child, continued revoked, notwithstanding the decease of such child before the will took effect: *Burrow* v. *Baxter*, Amb. 490; *Hellyer* v. *Hellyer*, cit. 1 Phill. 412; *Sullivan* v. *Sullivan*, cit. 1 Phill. 343; *Emerson* v. *Bovill*, 1 Phill. 342.

Whether revocation could be rebutted by parol evidence.

It was long undecided whether the presumed revocation resulting from marriage and the birth of children could be rebutted by parol evidence. In the case of *Brady* v. *Cubit*, Doug. 31, Lord Mansfield considered the evidence to be admissible; though his decision does not rest exclusively upon this ground, and his Lordship's opinion has not received the countenance of subsequent Judges. It was warmly opposed by Lord Chief Justice Eyre, in the case of *Goodtitle* v. *Otway*, 2 Hen. Blackst. 522; the Chief Justice observing, that, in cases of revocation by operation of law, the præsumptio juris is so violent, that it does not admit of circumstances to be set up in evidence to repel it. So in *Doe* v. *Lancashire*, 5 T. R. 61, Lord Kenyon and Mr. Justice Buller strongly expressed their objection to and disregard of the parol evidence which had been adduced, to shew that the testator intended to make another will, excluding the child whose birth (with the previous marriage) produced the revocation. Lord Alvanley, in *Gibbons* v. *Caunt*, 4 Ves. 848, said, that he believed they went the length of admitting the evidence, but he did not like it. In *Kenebel* v. *Scrafton*, 5 Ves. 663, 2 East, 530, parol evidence of an intention not to revoke was offered; but Lord Rosslyn, on sending the case to the Court of King's Bench, observed, "that the parol evidence did not weigh at all, being only conversations, and not amounting to a republication, a court of law would pay no regard to it." But the Judges of that

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court came to a conclusion which rendered it unnecessary for them to enter into the question of the admissibility of the evidence.

[In the case already mentioned of *Marston* v. *Roe*, 8 Ad. & Ell. 14, in the Exchequer Chamber, the Judges unanimously decided against the admissibility of the evidence, as being productive of the evils which the Statute of Frauds was intended to prevent.] In the Ecclesiastical Courts, however, the evidence was admitted in regard to wills of personal estate; see *Calder* v. *Calder*, cit. 1 Phil. 472; *Gibbens* v. *Cross*, 2 Add. 455.]

Wills made since 1837 absolutely revoked by marriage alone.

[As to wills made since 1837, this question cannot arise. By the 18th section of the statute 7 Will. 4 & 1 Vict. c. 26, it is provided, "That every will made by a man or woman shall be revoked by his or her marriage, (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions.") And by section 19, "That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." On which two sections see Mr. Jarman's Remarks, 1 Treat. on Wills, 114.]

2. *By Cancellation or Obliteration.*

Cancellation revokes a will, when.

Revocation by burning, cancelling, tearing, or obliterating, by the testator himself, or in his presence and by his directions, was (post, p. 96, and also division 5 of this section), expressly recognised by the Statute of Frauds, and was not required to be attested by witnesses; so that, in this respect, wills of freehold and personal estate stood upon the same footing. In every case the question is quo animo the act was done, which is a conclusion to be drawn by a court or jury from all the circumstances. The mere physical act of destruction is itself equivocal, and may be deprived of all revoking effect by explanatory evidence. Thus, if a testator unintentionally throws ink upon his will instead of sand, (1 P. W. 346), or obliterates it during a fit of insanity, (*Scruby* v. *Fordham*, 1 Addams, 74), it will remain in full force, notwithstanding this accidental or involuntary obliteration; while, on the other hand, if he casts the will into the fire, with the intention of destroying it, but it is preserved without his knowledge by a third person, the revocation is nevertheless complete: *Bibb* v. *Thomas*, 2 Blackst. 1043. So, the destruction of the will by a third person, in the lifetime but without the knowledge of the testator, would not affect its validity; a fortiori if effected after his decease: *Haines* v.

Haines, 2 Vern. 241. [It is not, however, to be inferred from the case of *Bibb* v. *Thomas*, that the mere intention or even attempt of a testator to burn, cancel, tear, or obliterate his will, is sufficient to produce revocation within the meaning of the Statute of Frauds. See the case of *Doe* d. *Reed* v. *Harris*, 6 Ad. & Ell. 209; see also 8 Ad. & Ell. 1.] REVOCATION.

Where a testator, upon a sudden provocation by one of the devisees, tore his will asunder, and afterwards, being appeased, fitted the pieces together, and expressed his satisfaction that it was no worse, and that no material injury was done, it was held that the will remained unrevoked: *Doe* v. *Perks*, 3 Barn. & Ald. 489. In another case, the Prerogative Court decided in favour of a will, without any distinct evidence of its existence after the death of the testator, or of its destruction in his lifetime, there being strong reason, under all the circumstances, for supposing that the testator had unintentionally destroyed it, or at all events that its destruction, whenever effected, was without his concurrence: *Davis* v. *Davis*, 2 Add. 223. The rule in that Court seems to be, that, if a will is traced into the testator's possession, and cannot afterwards be found, it is to be presumed that he destroyed it animo revocandi: *Lillie* v. *Lillie*, 3 Hagg. 184; *Penhallow* v. *Robinson*, Id. 189, n.; [and so, if it is found in his possession cancelled: *Hare* v. *Nasmyth*, 3 Hagg. 192, n.;] but that, if the will is traced out of the deceased's custody, it is incumbent on the party asserting the revocation, to prove that the will came again into such custody or was destroyed by his directions: *Colvin* v. *Fraser*, 2 Hagg. 327. Effect of partial cancellation, or

Where there are two parts of a will, and the devisor cancels one, the presumption in general is, that he intends to destroy the effect of both: *Sir E. Seymour's case*, cit. 1 P. W. 346, 2 Vern. 742; *Burtonshaw* v. *Gilbert*, Cowp. 49; see also *Utterson* v. *Utterson*, 3 Ves. & Bea. 122; but the strength of such presumption depends upon circumstances. If the uncancelled part was in the possession of a third person (Cowp. 49), the animus revocandi is clear beyond question, since the testator has cancelled all that was within his reach: *Boughey* v. *Moreton*, 3 Hagg. 191, n.; if both parts were in the testator's possession, and but one is found uncancelled, the act is more equivocal; and if, in addition to this, it appears that the cancelled will was first altered by the testator, and then cancelled, together with the alterations, it is rather to be presumed that the testator, being dissatisfied with those alterations, had designedly cancelled the part of the will which contained them, and had preserved the unaltered duplicate, with the view of recurring to his original intention: *Pemberton* v. —destruction of *one* part only.

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Pemberton, 13 Ves. 310. And the presumption, it seems, would be in favour of the will, where one part was found *partly* mutilated, and the other carefully preserved, both being in the testator's own possession: *Roberts* v. *Round*, 3 Hagg. 548.

Where a testator had, both in his will and in a codicil to it, expressed the same intention (namely to exclude a child (*a*) from participating in a gift made in favour of his children generally, and had expunged the words declaratory of such intention from the codicil alone, this was held to let in the child: *Utterson* v. *Utterson*, 3 Ves. & Bea. 122.

The revocation, by cancellation or any other means, of a will extends to a codicil, the contents of which are founded on and connected with the will, so as to render it incapable of an independent operation: *Usticke* v. *Bawden*, 2 Addams, 116. And, in the Ecclesiastical Court, the general presumption from the cancellation of a will is in favour of the revocation of an uncancelled codicil, even in the deceased's own possession, though liable to be repelled by evidence of a contrary intention: *Medlycott* v. *Assheton*, 2 Addams, 229. [But a codicil, which was capable of subsisting independently of the will, was sustained notwithstanding the destruction of the latter: *Tagart* v. *Hooper*, 1 Curt. 289. In *Clogstoun* v. *Walcot*, 12 Jur. 422, the Court admitted parol evidence to shew that the testator, when he destroyed his will, did not suppose that that act would affect the codicils to it.]

Effect of partial obliterations.

If the testator drew a pen over certain parts of the will only, a revocation was effected pro tanto, [under the old law, and would be so under the new law also, if the part erased were made illegible], and the unobliterated portions remained in force; *Sutton* v. *Sutton*, Cowp. 812; as, where (to put a simple and ordinary case) a testator, after having devised property to several persons, strikes out the name of one of those persons, by this act he gives to the will the same operation as if the devisee had died in the testator's lifetime. If the estate or interest of the co-devisees was joint, the entire property would vest in the surviving joint tenants, (post, s. 7.); if they were tenants in common, the share of the deceased devisee would lapse, and a partial intestacy be produced, unless the subject of gift were a pecuniary legacy, or any other article of personal estate, which would fall to the residuary legatee if there was one, ["or unless," adds Mr. Jarman, in a subsequent work, 1 Treat. on Wills, 120, "the

(*a*) Here, it will be observed, the obliteration has the effect of enlarging the disposing contents of the will.

will was made since the year 1837, in which case the revocation of a specific devise would cast the real estate, which was the subject of such devise, into the hands of the residuary devisee."] REVOCATION.

It should seem, that the mere obliteration, by the testator, of the words referring to his will on the envelope of such will, did not amount to a revoking act of cancellation, and especially where it was accompanied by a memorandum, shewing that the testator considered the will to have been superseded by a subsequent one contained in the same envelope, but which turned out to be ineffectual for want of an attestation by three witnesses, the property being freehold; *Grantley* v. *Garthwaite*, 2 Russ. 90; for, it is to be observed, that, where the act of cancellation is connected with the making of another will, so as fairly to raise the inference that the testator meant it to depend upon the efficiency of the new disposition, the transaction will be viewed in this light; and accordingly, if the will intended to be substituted fails of effect from defect of attestation, or any other cause, the revocation will fail also, and the original will will subsist in unimpaired efficacy, [and the recent act has made no alteration in this respect.] As, where a testator, having some time before executed a will duly attested, to each sheet of which a seal was affixed, gave to his solicitor instructions to prepare another, and signed the draft prepared from those instructions, and then proceeded to tear off the seals from the old will; when, after all the seals but one had been thus removed, he was informed that the new will would not be operative upon his lands in its then state, which induced him to desist; and before the new will was complete the testator died; it was held that the former will remained unrevoked: *Hyde* v. *Hyde*, 3 Ch. Rep. 155. See also *Onions* v. *Tyrer*, 1 P. W. 343, Pre. Ch. 459; *Sutton* v. *Sutton*, Cowp. 812; *Winsor* v. *Pratt*, 5 J. B. Moore, 484. Cancellation, where connected with a new disposition.

And the same principle applies to partial alterations; so that, where a testator strikes out the name of one devisee, at the same time interlining that of another, or substitutes a larger or smaller interest or share for that which he had previously given, if the interlineation is inoperative, [as it now necessarily is in regard to every kind of property, if unattested], the obliteration will also fail of effect: *Short* v. *Smith*, 4 East, 419 (*a*); *Kirke* v. *Kirke*, 4 Russ. 435.

Where the posterior of two existing wills is cancelled by the testator in his lifetime, the effect of such cancellation clearly is [in regard to all wills made before the year 1838], to re-instate the prior will in its original predicament, as the only subsisting will of the testator; and such restored will, if not revoked by any subse- Effect of cancelling the posterior of two wills.

(*a*) This case, however, did not raise the precise point.

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quent act of the testator, will take effect as such at his decease. This is an inevitable consequence of the ambulatory character of the instrument, which character of course pervades its whole contents—extending no less to an express clause of revocation than to every other part; and hence the distinction, sometimes suggested, between cancelled wills which do and those which do not contain such clauses, in regard to their revoking effect upon an earlier uncancelled will, was wholly without foundation. And even the Ecclesiastical Courts, which for a long period entertained the doctrine that a cancelled will, with a clause of revocation, revoked a prior uncancelled one (vide cases cited in *Moore* v. *Moore*, 1 Phil. 412), have greatly modified, if not wholly abandoned it; for, in a modern case, Sir John Nicholl laid it down, that the legal presumption was neither adverse to nor in favour of the revival of a former uncancelled, upon the cancellation of a later revocatory, will. The question was open to decision either way, according to facts and circumstances, and which in the case then before the Court were thought strongly to favour the revival: *Usticke* v. *Bawden*, 2 Addams, 116. [And see *James* v. *Cohen*, 8 Jur. 249, in which the doctrine of *Usticke* v. *Bawden*, that there is no presumption either way, was followed. To prevent any such question in regard to wills made since 1837, it is provided by the 22nd section of the stat. 7 Will. 4 & 1 Vict. c. 26, "that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn."]

Stat. 7 Will. 4 & 1 Vict. c. 26, s. 22, excludes revival of revoked will unless so intended.

[The Statute of Frauds enacted, that a will should be revocable by "burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence and by his direction and consent:" and the presence of attesting witnesses was not required. By the stat. 7 Will. 4 & 1 Vict. c. 26, s. 20, a will is made revocable "by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same." In the former act cancelling and obliterating were placed in the same classification with tearing or burning; but by the new act obliteration is specially distinguished from burning or tearing, by being made the subject of a distinct section (s. 21), which provides, "that no obliteration, interlineation, or other alteration, made in any will after the execution

Revocation by burning, tearing, or otherwise destroying within 7 Will. 4 & 1 Vict. c. 26.

thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."]

Obliterations and alterations in a will to be signed and attested.

[Both the Statute of Frauds and the recent act require that the destruction should be made in the presence *and* by the direction of the testator. "And therefore," observes Mr. Jarman, 1 Treat. on Wills, 129, "it should seem, that if a testator desires a third person, having the custody of his will, to destroy it, which is accordingly done, such destruction, if not effected in the presence of the testator, would not amount to a revocation."]

Destruction must be in the presence of the testator.

[In the case of *Hobbs* v. *Knight*, 1 Curt. 768, where a testator duly executed a will in 1835, and after the 1st of January, 1838, cut therefrom his signature: it was held, first, that, notwithstanding the 34th section of the stat. 7 Will. 4 & 1 Vict. c. 26, it was not the intention that wills executed before January 1st, 1838, should be exempted from the provisions of the statute with respect to any act done to such wills after that date; secondly, that the cutting out of the signature amounted to a revocation of the will, under the words, in the 20th section, "tearing or otherwise destroying the same." See *Longford* v. *Little*, 2 Jones & Lat. 633.]

Hobbs v. *Knight.*

[In the case of *Stephens* v. *Taprell*, 2 Curt. 458, where a will duly executed was found cancelled thus: the body of the will was struck through with a pen, the name of the testator was crossed out, the attestation clause and the names of the witnesses were likewise run through with a pen; and the question was, whether this will was destroyed, within the meaning of the 20th section: it was held, that "the Legislature, having advisedly omitted cancelling amongst the modes of revocation, and substituted words of more equivocal meaning, cannot have intended that striking through with a pen should be a mode of revocation."]

Effect of the omission of the word "cancelling" from the late act: not a revocation under the words "otherwise destroying."

[But in *Re Tozer*, 2 Notes Eccl. Cas. 11, where a paper was executed in the presence of two witnesses present at the same time, who subscribed according to the act, but the name of one of the witnesses having been badly written, such signature was cut off, with the knowledge and in the presence of the testator, and the name of such witness was written by another person, but not in his presence;

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such paper was admitted to probate, on motion, as having been once properly executed, and *not revoked with intention* of revoking the same.]

[*In re Colberg*, 1 Notes Eccl. Cas. 90, a will duly executed being soon after execution torn in a fit of anger by the testator, who, repenting immediately afterwards, declared he did not mean to revoke it, was considered primâ facie to have been revoked, but, on the consent of the next of kin, was admitted to probate, the Court holding that the testator had not done all that he had intended to do, as in *Doe* d. *Perkes* v. *Perkes*, 3 B. & A. 489.]

[In *Re Lambert*, 1 Notes Eccl. Cas. 131, part of a draft will, which was executed by the testator by way of precaution, was cut away, without evidence as to when it was done, and this was held to be a revocation pro tanto, whether done before or after the act.]

[In *Birkhead* v. *Bowdoin*, 2 Notes Eccl. Cas. 66, the names of the witnesses were torn from a will, which was referred to in a will duly executed; it was proved that those signatures were torn off without intention of revoking entirely, but that such will should operate as a list of legacies; and so much of the former will was admitted to probate.]

Obliterations.

[In *Brooke* v. *Kent*, 2 Curt. 343; Appeal to P. C. 1 Notes Eccl. Cas. 93, the testator, after the statute 7 Will. 4 & 1 Vict. c. 26, came into operation, erased certain words in a will executed in July 1837, and wrote a memorandum attesting what the words erased originally were, but such memorandum was unattested. Motion for probate of the will as it originally stood was rejected, in conformity with the construction put by the Court upon the 21st section (2 Curt. 332 and 337): but Sir H. Jenner advised that the will should be propounded, in order that the opinion of the Superior Court might be taken upon the point. This was done, and the allegation propounding the will as it originally stood being rejected, an appeal was prosecuted to the Privy Council, where it was held, that a will dated before the 1st January 1838, but re-executed, republished, or revived by a codicil subsequent to that date, comes within the statute; and that alterations or obliterations made on or after 1st January, 1838, to a will dated before that time, must be governed by the statute; that by the 20th section an intention to revoke is absolutely necessary to effect a revocation; that in the same manner, by construction with reference to the 21st section, intention must accompany acts of obliteration, interlineation, and alteration, as it accompanies the acts mentioned in the 20th section; which intention is to be ascertained, as under the Statute of Frauds; that the judgment of the Prerogative Court excluding evidence dehors the instrument must be reversed. The making evidence of intention not to

revoke absolutely but by substitution, and such revocation having been ineffectual, their Lordships decreed probate of the will in its original state. In *Townley* v. *Watson*, 3 Curt. 761, where a testatrix obliterated animo revocandi several passages of her will, with a pen and ink, so that those passages were completely illegible, it was held that this was a complete revocation within the meaning of the 21st section, and the Court pronounced for the will without the obliterated passage.] REVOCATION.

[As to interlineations, see *Re John Mills*, 11 Jur. 1070.] Interlineations.

[In *Burgoyne* v. *Showler*, 1 Robert. 5, it was held, that in the absence of all evidence the inference of law is, that alterations on the face of a will were made *after* the execution of the will. On the subject of alterations, see also *Keigwin* v. *Keigwin*, 7 Jur. 840, and the cases collected in Edwards's Abridgment of Cases in the Prerogative Court, 88 et seq., 93 et seq.] Whether alterations were made before or after signature.

3. *Revocation by an Alienation or Interruption of the Testator's Estate.*

The two species of revocation treated of under the former sections affect the entire will. The present embraces specific gifts only, among which, we must remember, is to be classed every devise of land [under the old law] in whatever terms expressed. To such a devise it was essential not only that the testator should be seised at the time of the execution of the will, but that he should continue so seised without interruption until his decease. Revocation by alienation.

The most obvious instance of revocation by parting with the estate was where a testator absolutely sold and conveyed it in his lifetime, the effect of which, of course, was to revoke the devise; and if, by the will, the estate had been given to trustees for sale, with a direction to divide the produce among certain persons, such legatees would have had no claim to the monies arising from the testator's sale, though they could be traced into an investment on security, which security, in the case referred to, partly consisted of a mortgage on the sold estate: *Arnald* v. *Arnald*, 1 B. C. C. 401. —absolute sale.

Another familiar case of revocation occurred where property held by leases for lives was surrendered by the testator after the making of the will, in consideration of a new lease being granted; which renewal, by conferring on the testator a different estate from that which existed at the execution of the will, necessarily revoked the devise. —renewal of lease.

Thus, in the case of *Marwood* v. *Turner*, 3 P. W. 163, where A., —where the

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lease is freehold.

being seised of the manor of S., held by a lease for three lives, devised the said leasehold estate for the three lives to two trustees and their heirs, whom he directed to renew the lease. The testator subsequently surrendered the lease, and took a new one. Lord Chancellor King held that the renewal of the lease was a revocation of the devise, for, by this surrender of the old lease, the testator had put all out of him, had divested himself of the whole interest; so that there being nothing left for the devise to work upon, the will must fall; *and the new purchase, being of a freehold descendible, could not pass by a will made before such purchase.*

—where for a term of years.

The renewal of a chattel lease (whether absolute or determinable with lives) had a similar revoking effect upon a specific bequest, the language of which was not specially pointed to the future term; though it is observable that *here* the revocation was produced, not by any principle of law forbidding the testamentary disposition of the after-acquired property, (as in the instance of *freehold* leases), but by the inapplicability of the terms of the bequest to such property. Thus, in *Abney* v. *Miller*, 2 Atk. 593, where A., being possessed of two college leases, made his will, and thereby gave and devised all his college leases which he then held of Magdalen College, —Lord Hardwicke decided, that a renewed lease, granted subsequently to the making of the will, did not pass. He observed, that this was not a devise of the land, but a devise of the leases "which I *hold*" of Magdalen College; so that it was the same as if the testator had said, "I devise a term," and that term is surrendered and gone.

Bequest of tithes revoked by renewal.

The distinction suggested by his Lordship between a devise of the lease and of the property was afterwards overruled; and it was clear, that renewal revoked as well where the bequest was of the corpus, i. e. of a house or close, as where it was of the *interest*, i. e. of a lease or term. Thus, in *Rudstone* v. *Anderson*, 2 Ves. sen. 418, where a testatrix devised all her lands, tenements, and hereditaments at W., and all her tithes and ecclesiastical dues payable out of W. aforesaid, or any other towns or places near the same: at the time of making the will, she was possessed of a lease of tithes at W., under the Archbishop of York: afterwards, the testatrix surrendered this lease, and took a new one, of which she was possessed at the time of her death—Sir John Strange, M. R., thought there was no real distinction between the words "all my tithes at W.," and if it had been "all my lease or interest in my lease at W.;" because both must refer to the interest she had at the time of making the will. Then, that interest did not remain at the death of the testatrix; for, by the surrender, she so far altered her interest, that what were her

tithes under the lease at making the will could not be considered under the foot of this clause as being the same at the time of her death; but she acquired a new estate in them to commence at and run out to a different period of time; consequently, the tithes did not pass.

Again, in *Hone* v. *Medcraft*, 1 B. C. C. 261, where S., by his will, gave and devised unto B. the perpetual advowson and disposal of the living or rectory of W., for ever, together with the tithes of all sorts thereof. The rectory of W. was held by the testator by lease from New College, Oxford, for the term of ten years. After the execution of the will, the testator surrendered up that lease, and took a new lease from the college for ten years more. Lord Thurlow held, that the renewed term did not pass by the bequest, observing, that he had looked over all the cases, and must contradict them all if he did not construe the devise of the lease which was afterwards surrendered to be a lapsed (*qu.* revoked) devise.

Bequest of leaseholds at C. revoked by renewal.

So, where a testator, having a renewable lease for twenty-one years, from the prebendary of the prebend of Caddington Major, by his will devised *all his leasehold estates in the parish of Caddington*, charged with an annuity, and subsequently renewed the lease, such renewal was admitted to be a revocation, the principal question discussed being, whether a codicil, made by the testator subsequently to the renewal, was a republication, which was decided in the affirmative: *Coppin* v. *Fernyhough*, 2 B. C. C. 291. ["In all such cases," observes Mr. Jarman, 1 Treat. on Wills, 281, "the renewal of the lease under the old law revoked the bequest, or rather, to speak more accurately, withdrew from its operation the property which was the subject of disposition: in short, effected what is technically called an ademption."]

Bequest by equitable owner of lease and all profits, &c., held to carry right of renewal.

But, where it might have been fairly inferred from the terms of the bequest, or the context of the will, that the testator intended the right of renewal to pass as an accessory to the immediate subject, the construction was governed by this apparent intention. Thus, where a testator, who was possessed of the equitable interest of a prebendal lease by his will declared that his eldest son, T., should have the disposal of the lease of his prebend of T., and that he should receive to himself *all the profits and advantages arising and accruing from it* (*a*); Lord Hardwicke was of opinion that the words were sufficient to pass the interest of the renewed lease, more especially as the tes-

(*a*) But might not these words have been satisfied by being applied to the existing lease?

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tator had the equitable interest and not the legal estate: *Carte* v. *Carte*, 3 Atk. 174. In a subsequent case, a testator, who was, by his marriage settlement, under an obligation to renew the lease of certain property which had been there settled, and the beneficial interest whereof was, in default of issue of the marriage, vested in himself, by his will, describing it as his manor &c. in L., held by lease from the Dean and Chapter of Windsor, bequeathed the property to the trustees of his marriage settlement, upon certain trusts, including, among others, a trust to perform the covenants contained as well in the then lease *as in any future leases thereafter to be obtained.* Lord Eldon, affirming a decree of Sir J. Leach, V. C., was of opinion, that, regard being had to the language of the settlement and will, the testator must be considered as dealing with his whole interest and the obligations which existed, and that the devise passed all future renewals, as well as the term which then subsisted: *Colegrave* v. *Manby*, 2 Russ. 238. See also *S. C.*, 6 Madd. 72.

Remarks upon *Colegrave* v. *Manby*.

It appears by the report of the Vice-Chancellor's judgment, that the learned Judge was inclined to fall in with Lord Hardwicke's idea in *Carte* v. *Carte*, 3 Atk. 174, that a bequest of the testator's interest in leaseholds referred to his interest at the time of his decease; but Lord Eldon, though he affirmed his Honor's decree, lent no countenance to any such doctrine, which, moreover, is completely contradicted by the case of *Slatter* v. *Noton*, 16 Ves. 197, where a bequest by a lessee of her dwelling-house, *and all her estate, term, and interest therein,* was held not to include a term for years subsequently acquired by the renewal of the lease. Sir W. Grant, who decided this case, was, at one period, even disposed to carry the doctrine to a greater, and, according to high authority, an indefensible extent; his Honor having decided that a bequest of leaseholds "for all the residue of the term and interest I shall have to come therein at my decease," merely referred to the residue which might, at the testator's decease, happen to be unexpired of the term which existed at the making of the will, and not to an interest subsequently acquired by renewal. But Lord Eldon, on appeal, reversed his Honor's decree, on the ground that the words were clearly sufficient to pass the interest the testator should have at his decease: *James* v. *Dean*, 15 Ves. 236.

Words descriptive of testator's estate and interest, referred to existing lease.

What expression will comprise the term existing at the testator's death.

The principle of Lord Eldon's reversal agrees precisely with that of the decision in *Churchman* v. *Ireland*, 1 Russ. & M. 251, that a devise of all and singular the estate and effects, real and personal, "which I shall die possessed of," referred not merely to the lands then belonging to the testator of which he should die seised, (accord-

ing to the construction in *Back* v. *Kett*, Jac. 534), but was intended to embrace all property which the testator might acquire after the execution of his will. See also *Thellusson* v. *Woodford*, 13 Ves. 209; *S. C.*, *nom. Rendlesham* v. *Woodford*, 1 Dow, 249.

Residuary bequest will pass after-acquired leaseholds.

Where a specific bequest of leaseholds was revoked by renewal, they fell to the residuary legatee, whose title to the residue, including as well what eventually became residue by the lapse or ademption of specific bequests or otherwise, as what originally composed it, was wholly unaffected by any changes which the property might have undergone in the testator's lifetime: *Stirling* v. *Lydiard*, 3 Atk. 199. See also *Digby* v. *Legard*, Dick. 500. Such a bequest also operated on a leasehold for lives, renewed after the making of the will, if made transmissible to the executors or administrators of the testator; and such clearly would be its course of devolution, unless there were, in the last conveyance, words of limitation, giving it a contrary destination: *Ripley* v. *Waterworth*, 7 Ves. 425. Where the heir was special occupant, his title could not have been defeated by *any* devise, particular or residuary, in an *antecedent* will: *Digby* v. *Legard*, 2 Dick. 500.

Revocation by conveyance, under which the property was re-vested in the testator.

A devise of real estate was revoked by a conveyance made subsequently to the will, though, by the limitations or effect of such conveyance, the property was instantly revested in the testator. Thus, if A., being seised in fee of Whiteacre, devised such land by name, or all his lands generally, to B., in fee, and afterwards, by lease and release, bargain and sale, or any other assurance, conveyed Whiteacre to the use of himself for life, remainder to his wife for life, remainder to his own right heirs, the devise of Whiteacre was revoked: *Burgoine* v. *Fox*, 1 Atk. 575.

Revocation by a common recovery.

So, where the testator, being seised for life of lands, with remainder to trustees to preserve, with remainder to his first and other sons in tail, with remainder to himself in fee, suffered a common recovery, the use whereof was declared to be to himself in fee, such recovery was held to have revoked a previous will of the recoveree devising the lands in question: *Darley* v. *Darley*, 3 Wils. 6, Amb. 653; *S. C.*, nom. *Darley* v. *Langworthy*, 3 B. P. C. Toml. ed. 359; *Bennett* v. *Wade*, 2 Atk. 325; *Harmood* v. *Oglander*, 8 Ves. 106.

Principle of the cases.

It will be perceived, that, in both the preceding examples, the testator, under the limitations of the conveyance, was *in* of his old estate; hence it is obvious that the revocation was not produced by any change which it effected in the nature of the testator's estate, but was simply consequential on the momentary interruption of the testator's seisin. (See also *Sparrow* v. *Hardcastle*, 3 Atk. 799; 7 T. R.

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Disseisin did not revoke, when.

416, n.; *Langford* v. *Little*, 2 Jones & Lat. 632.) But, where such interruption took place, not by the act of the testator himself, but by the tortious act of a stranger, the devise was not affected. As, where a testator was disseised subsequently to the making of his will and re-entered, the entry restored the original seisin; and, by relation, the disseisee was considered to have been seised ab initio, so that his devise remained unrevoked: *Bunter* v. *Coke*, 1 Salk. 237; *Attorney-General* v. *Vigor*, 8 Ves. 282.

But, if the disseisee was out of possession at the time of the making of the will or at the death, the devise was inoperative.

Exchange.

So, where a man made his will, devising lands, and then exchanged those lands for others and died, if the exchange was vacated subsequently to the testator's death, in consequence of a defect in the title, or in the aliening capacity of the other party, this did not restore the operation of the devise: *Attorney-General* v. *Vigor*, 8 Ves. 256.

Doctrine in relation to equitable interests.

Returning, however, to the cases of revocation by a new limitation of the devised estate, it is to be observed, that, as equity follows the law, the devise of an equitable interest was held to be revoked by a conveyance similar to that which would have revoked a devise at law. And, therefore, where a testator, who had the equity of redemption in certain lands, devised them, and afterwards, in contemplation of marriage, conveyed the devised lands to the use of himself and his heirs until the intended marriage, and, after such marriage, to other uses, though the marriage never took effect, yet the devise was held to be revoked: *Earl of Lincoln's case*, Show. Parl. Ca. 154; 1 Eq. Ca. Ab. 411, pl. 11. See also *Pollen* v. *Huband*, 1 Eq. Ca. Ab. 412, 7 B. P. C. Toml. ed. 433. [See also *Locke* v. *Foote*, 5 Sim. 618.]

Effect of conveyance for a partial purpose.

The preceding cases shew that a devise was revoked by a conveyance, of which the operation was nothing more than to revest the estate in the testator. And the same doctrine extended (though certainly with some rather considerable exceptions) to conveyances for partial purposes. Thus, if a testator, in order to secure a jointure rent to an intended wife, limited the devised lands to trustees for a term, and then went on to limit the fee to himself, the latter limitation, (or rather the conveyance in fee which contained it), though altogether unnecessary for his purpose, revoked the devise: *Goodtitle* v. *Otway*, 2 H. Blackst. 516, 1 Bos. & Pull. 576, 7 T. R. 399, 2 Ves. jun. 604, n.; *Cave* v. *Holford*, 3 Ves. 650, 7 B. P. C. Toml. ed. 593. See also *Vawser* v. *Jeffery*, 16 Ves. 519, 2 Swanst. 268. [As to the effect where the conveyance is not only partial in its object but in its operation, see 1 Jarm. Wills, 130, 131.]

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—In regard to copyholds.

This doctrine, however, did not apply to copyholds, the surrender of which to uses, creating particular estates only, (the ultimate limitation being to the use of the surrenderor himself), did not revoke a prior devise in regard to the reversionary inheritance included in such ultimate limitation. Thus, where A., who was seised in fee of freehold and copyhold estates, devised them by his will, and subsequently conveyed the freeholds to the use of himself for life, with remainder to the intent that B., his intended wife, should receive an annuity of 300*l.* for her life, by way of jointure, and subject thereto to trustees for ninety-nine years, upon trusts for securing the jointure, and subject thereto to the use of A., his heirs and assigns, for ever. At the same time, the testator surrendered his copyhold lands to the same uses; and it was held, that the devise (though clearly revoked as to the freeholds by the conveyance of them) was not, as to the copyholds, affected by the surrender beyond the particular estates; on the ground that, according to the doctrine of the case of *Thrust-out* v. *Cunningham*, 2 Blackst. 1046, Fea. C.R. 68, the fee simple of the testator was not disturbed or interrupted by the surrender of the ultimate inheritance to the use of himself: *Vawser* v. *Jeffery*, 3 Barn. & Ald. 462. See also *S. C.*, in Equity, 3 Russ. 479; and see post, p. 111.

Partition did not revoke.

And even, in regard to freeholds, the rule that a conveyance of the fee for a partial purpose produced revocation, admitted of two very important exceptions. The first was in the case of a partition between tenants in common, or co-heirs, which, by whatever kind of assurance effected, did not revoke a previous devise, provided the conveyance be confined to the mere object of the partition, i. e. provided it assured to the testator, in the allotted lands, an estate precisely correspondent with that which he had in his undivided share: *Luther* v. *Kirby*, 8 Vin. Ab. 148, pl. 30(*a*), cit. 3 P. W. 170; *Riley* v. *Baltinglass*, Sir T. Raym. 240; *Webb* v. *Temple*, 1 Freem. 542.

Mortgages inaccurately said to revoke pro tanto only.

The other and well known exception was, where a testator, subsequently to his will, made a mortgage of the devised lands, which, it is familiarly said, revokes the will in equity pro tanto only: *Hall* v. *Dunch*, 2 Ch. Rep. 154; *Perkins* v. *Walker*, 1 Vern. 97. To designate a mortgage a pro tanto revocation, however, is very inaccurate, and tends to create an erroneous impression of its actual effect on the rights of the parties claiming under the testator; for the phrase

(*a*) In this case A. and B. were tenants in common in fee. A. devised his moiety. A partition then took place, and a fine was levied, the uses whereof were declared as to the entirety of part to A. in fee, and of the residue to B. in fee. The devise remained unrevoked.

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might seem to import that the transaction was viewed in the light of a deliberate retraction by the testator of his bounty to the extent of the mortgage, in which case the devisee would take the property cum onere, as against not only the mortgagee, but also the testator's own representatives, in the same manner as if the testator had created the charge by his will; but so far is this from being the case, that the devisee is clearly entitled to have the estate disincumbered out of the personal estate of the testator not specifically bequeathed: *Warner* v. *Hawes*, 3 B. P. C. Toml. ed. 21. It is obviously a perversion of language, therefore, to call a mortgage a revocation pro tanto. In short, the term is very inaptly applied in any of these cases in which the devise is defeated by the testator's subsequent conveyance of the devised property, which are all examples of ademption rather than of revocation.

Circumstances not varying the rule as to mortgages.

It was quite immaterial whether the testator had the legal estate or was equitable owner only, (see *Tucker* v. *Thurstan*, 17 Ves. 131); whether the mortgage was created by fine or any other assurance, (*Rider* v. *Wager*, 2 P. W. 334; *Jackson* v. *Parker*, Amb. 687); whether it contained a power of sale, (*Ogle* v. *Cook*, cit. 3 Atk. 746; see also *Vernon* v. *Jones*, Pre. Cha. 32, 2 Vern. 241, 1 Eq. Ca. Ab. 410, pl. 10, 2 Freem. 117; see also *Earl Temple* v. *Duchess of Chandos*, 3 Ves. 685); which power was accompanied by a declaration that the surplus of the monies arising from the sale should be personal estate of the testator, (*Hodges* v. *Green*, 4 Russ. 28); or, lastly, whether the mortgage was made to the devisee himself, or to a stranger: *Peach* v. *Phillips*, Dick. 538: *Baxter* v. *Dyer*, 5 Ves. 656, overruling *Harkness* v. *Bayley*, Pre. Cha. 514. In all these instances, the conveyance did not affect the devise farther than by giving to the mortgage creditor a claim to be satisfied his debt out of the devised estate.

Conveyance in trust for sale.

And a conveyance in trust to sell for the payment of debts generally, was no less inoperative to vacate a previous devise of the property so conveyed, than a simple mortgage for a definite sum lent: *Vernon* v. *Jones*, 2 Vern. 241. See also *Earl Temple* v. *Duchess of Chandos*, 3 Ves. 685. And the same has been decided in regard to bankruptcy, which subjects the testator's property at large to a similar course of application: *Charman* v. *Charman*, 14 Ves. 580.

Bankruptcy.

Mortgage for a term.

Mortgages by demise, of course, did not, even at law, produce revocation ultrà the estate to which they extended. Thus, where a testator, after devising freehold lands in strict settlement, demised them, by way of mortgage, for one thousand years, the inheritance, out of which the term has been carved, still passed by the devise,

precisely in the same manner as where a testator, subsequently to his will, granted a short lease at rack rent of the devised property: *Hodgkinson* v. *Wood*, Cro. Car. 23; for, the same principle obtained whether the term was for one thousand years or seven.

Lease at rack rent no revocation of an annuity devised out of the property.

Where a testator, by his will, charged lands with an annuity, and afterwards, in his lifetime, demised those lands at a rack rent, the lease did not revoke the annuity, and the annuitant was entitled to have the rent, or an adequate portion of it, applied in satisfaction of his demand: *Parker* v. *Lamb*, 3 B. P. C. Toml. ed. 12; but he would have had no power of distress as against the lessee. In such a case, therefore, a term should be devised to a trustee for the purpose of securing the annuity, which would entitle the devisee in trust to receive, as incidental to the reversion, the rent reserved by the lease: *Parker* v. *Lamb*, 3 B. P. C. Toml. ed. 12 (*a*).

Partition or mortgage deed, having an ulterior purpose, revoked.

If the partition, or mortgage deed, did not stop with merely effecting the partition or mortgage, but modified the ulterior ownership, it revoked the devise. As, where, by a deed of partition between two co-heirs of gavelkind lands, (one of whom had previously made a will devising his share), the lands allotted to the testator were limited to such uses as he should, by deed or will, appoint, and, in default of appointment, to him in fee; it was held, that, by this new limitation of the use, the previous devise of the property was revoked: *Tickner* v. *Tickner*, cit. 1 Wils. 309, and 3 Atk. 742, 745, 750. So, where A., being owner in fee of fee-farm rents, subject to certain marriage articles, whereby he had agreed to settle them in strict settlement, with reversion to himself in fee, made his will, by which he devised the rents; and, subsequently, on borrowing 5,500*l.* from B., by lease and release, for securing the repayment, and barring all estates tail, &c. conveyed the fee-farm rents in question to C., his heirs and assigns, to the intent that a common recovery might be suffered; and it was declared that such recovery should enure to the use of B. (the mortgagee) for one thousand years, subject to redemption, remainder to the testator for life, with remainder to F., his wife, for life, with remainder to himself in fee. The recovery (which it will be seen was altogether unnecessary) was never suffered; but Sir R. P. Arden, M. R., and afterwards Lord Eldon, on appeal, expressed a decided opinion that the devise was revoked, the testator having subjected the property to ulterior limitations, beyond the purpose of a mere mortgage; and considering, his Lordship ob-

(*a*) The contrary of this might be inferred from the reporter's marginal epitome of the case, which is also inaccurate in numerous other instances.

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served, in reference to the authorities, "how very little, in addition to that mere purpose, will revoke:" *Harmood* v. *Oglander*, 6 Ves. 199; 8 Ves. 166.

It is clear that, if the limitations in this case had been simply to the mortgagee for the term, and, subject thereto, to the mortgagor himself in fee, the will would have been revoked, precisely as if, *without any mortgage, the fee had been so limited.*

Again, where a testator, seised in fee, conveyed certain real estates to trustees, upon trust, by sale or mortgage, to raise certain mortgage and other debts, and the trustees were to stand possessed of the surplus, in trust for the grantor, his executors and administrators, as personal estate; and it was provided, that, until a sale, the trustees should apply the rents in payment, first, of the interest on a mortgage, and, secondly, *of an annuity to the grantor's wife for her separate use*—Sir J. Leach, M. R., held, that the will was revoked, not (as had been contended) on account of the direction that the residue of the monies arising from the sale should be personal estate, which did not vary the operation of the deed, but on account of the annuity, which might continue after the testator's death: *Hodges* v. *Green*, 4 Russ. 28.

What words in the proviso for redemption rendered a mortgage revocatory.

What words introduced into the proviso for redemption indicated an intention to change the equitable ownership, so as to revoke a previous devise by the mortgagor, is not clear. The cases certainly authorise the conclusion, that such an intention would not be inferred from loose expressions affording conjecture merely; but it must have been explicitly and unequivocally declared that the estate was to be reconveyed to uses different from those which previously existed; a doctrine which seems to agree with the well-known rule, establishing that the interests of a husband and wife, joining in a mortgage of her property, are not varied by ambiguous expressions thrown into the proviso for redemption. Thus, where A., subsequently to his will, by a conveyance by way of security, in consideration of 800*l.* advanced by B., conveyed lands to trustees in fee, upon trust to permit him to enjoy until default of payment; and, upon payment of principal and interest, upon trust, to reconvey unto and to the use of the testator, his heirs and assigns, or unto and to the use of such other person or persons, and for such estate and estates, and to and for such lawful trusts, intents, and purposes, as A., his heirs or assigns, by any deed or deeds, instrument or instruments, in writing, under his or their hand or respective hands, should direct, limit, or appoint; and that clear of and from all intermediate charges and incumbrances whatever; and in default of payment the trustees were

Brain v. *Brain.*

empowered to sell (*a*). Sir J. Leach, V. C., held, that this was a revocation pro tanto only. "The true question," his Honor observed, "is, whether, by the addition of the words which follow the direction to reconvey to the devisor and his heirs, he does, in fact, acquire any new estate or power; or whether these subsequent words do not leave him with the same estate and the same powers as he would have had if they had not been used. It is plain, that he who has a right to call upon trustees to convey to himself and his heirs, has a right, by any instrument under his hand, to direct the same trustees to convey to the use of any other person, and for any estates and interests, at his pleasure. The authority to make such direction by any deed or instrument under his hand is the necessary consequence of this conversion of his legal estate into an equitable interest; and the subsequent words are mere 'expressio eorum quæ tacitè insunt.' I am of opinion, therefore, that the conveyance in question, being by way of security for money, is a revocation pro tanto only. I am unable to say whether this opinion does or does not interfere with the case of *Kenyon* v. *Sutton*, for want of knowing accurately the facts of that case; but it certainly does not interfere with the case of *Tickner* v. *Tickner*, where a new power to appoint to uses was acquired:" *Brain* v. *Brain*, 6 Madd. 221. REVOCATION.

The case of *Kenyon* v. *Sutton*, referred to by the Vice-Chancellor, is a decision of Lord Alvanley when at the Rolls, and appears, by that learned Judge's own brief statement of it, in *Williams* v. *Owens*, 2 Ves. jun. 600, to have been simply this:—A., who was seised in fee of the property in question, after devising it by his will, executed a conveyance in trust for the payment of debts, in which it was declared that, after payment of the debts, the trustees should convey to such uses as A. by deed or will should appoint, and for default of appointment, to him in fee; the Master of the Rolls held the devise to be revoked. *Kenyon* v. *Sutton*.

Though an absolute conveyance by an equitable owner revoked a prior devise, by analogy to the rule which makes a similar alteration of estate a revocation at law, yet when the testator merely clothed his equitable title with the legal estate, by taking a conveyance to himself, this transaction, since it produced no change in the beneficial ownership, which was the subject of the devise, left that devise unrevoked. See *Parsons* v. *Freeman*, 3 Atk. 749; *Dingwell* v. *Askew*, 1 Cox, 427. Mere acquisition of legal estate, no revocation.

If, therefore, a testator contracted for the purchase of land, by

(*a*) [A. died *before* the day appointed for redemption. See Lord Cottenham's observations in *Bullin* v. *Fletcher*, 2 Myl. & K. 432.]

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which he became equitable owner in fee, then devised it by his will, and subsequently procured the land so purchased to be conveyed to him simply in fee, the equitable interest acquired by the contract still passed by the devise, and the heir-at-law, to whom descends the legal inheritance afterwards conveyed, will be a trustee for the devisee: *Fullarton* v. *Watts*, cit. Doug. 691. If, however, the conveyance went beyond the mere transfer of the legal title to the equitable owner, and newly modified the property, revocation was of course produced, as it would have been if the equitable interest separately had been so modified. Thus, if a testator, after having contracted to purchase lands, and devised them, caused the conveyance to be made to the usual uses to prevent dower, viz. to such uses as he shall appoint, and in default to the use of himself for life, with remainder to a trustee for himself during life, with remainder to him (the purchaser) in fee, the devise was revoked: *Rawlins* v. *Burgis*, 2 Ves. & Bea. 382. And the same effect was produced where the conveyance was simply to such uses as the devisor shall appoint, and in default of appointment to him in fee: *Tickner* v. *Tickner*, cit. 1 Wils. 311, 3 Atk. 742; *Parsons* v. *Freeman*, 3 Atk. 741.

Where conveyance to purchaser revoked will made after contract.

Of course, if the conveyance was to a trustee for the purchaser, the devise was not affected; its only operation being to transfer the legal estate from the vendor or his trustee to the purchaser's nominee: *Fullarton* v. *Watts*, Doug. 691; secus, where (according to the old inefficient mode of excluding dower) the legal inheritance was limited to the purchaser and a trustee jointly, which altered the quality of the estate: *Ward* v. *Moore*, 4 Madd. 368.

If the contract pointed out the nature of the limitations which were afterwards inserted in the conveyance, it was clear that such conveyance, operating as it then did only to turn the equitable into legal estates, did not revoke the will; but it may admit of doubt whether the mere stipulation that the estate should be conveyed to the purchaser in fee, *or to such other uses as he shall direct*, would have prevented a conveyance to the ordinary uses to prevent dower from producing revocation; for, as the words to this effect, where inserted in a proviso for redemption in a mortgage, are merely equivalent to a direction to convey to the mortgagor in fee, (vide ante, p. 108), it seems difficult, consistently, to ascribe to them greater potency in a contract. [And where in a contract made before the will the vendor agreed to convey to the purchaser, his heirs, appointees, or assigns, it was held that a subsequent conveyance to uses to bar dower in favour of the testator, with a power of appointment, operated as a revocation of the devise: *Bullin* v. *Fletcher*, 1 Kee. 369; affirmed on appeal, 2 Myl. & Cr. 432.]

As to equitable interests created by marriage articles.

The same general doctrines were applicable in regard to equitable interests created by marriage articles as to those derived from contracts for purchase. The revoking effect of a conveyance made under the articles, upon a will disposing of the equitable interest derived under the articles, depended entirely upon the fact, whether the conveyance was a mere execution of the articles which created the equitable interest in question, or newly modified the ownership: *Parsons* v. *Freeman*, 3 Atk. 741; *Brydges* v. *Duke of Chandos*, 2 Ves. jun. 417, 7 B. P. C. Toml. ed. 382.

Effect where the ultimate fee was to be conveyed to the covenantor himself.

But it is to be observed, that where, by the articles, the intended settlor covenanted to convey the lands to certain uses, and, subject thereto, to the use of himself in fee, this did not sever the equitable from the legal ownership in regard to such ultimate fee, so as to support a devise made intermediately between the articles and the conveyance, since such severance could only be produced through the medium of an obligation attaching on the covenantor to convey the reversion in fee to himself, and there seems to be no title in any third person to call for such a conveyance; for one cannot have a legal estate in trust for oneself. Influenced, it seems, by considerations such as these, Lord Eldon, in *Harmood* v. *Oglander*, 8 Ves. 127, overruled the case of *Williams* v. *Owens*, 2 Ves. jun. 595, where the contrary doctrine was advanced by Sir R. P. Arden, who appears to have confounded the case of a covenant to convey with that of an actual conveyance, by means of which, of course, the grantor may effect a severance of the legal and equitable ownership, by vesting the legal inheritance in a trustee for himself. The learned Judge entertained the notion, that the articles imposed on the covenantor an obligation to convey the fee, which fully accounts for (and, had it been correct, would have justified) the conclusion at which he arrived. The argument upon which Lord Eldon impugned the case of *Williams* v. *Owens*, would seem to involve the conclusion, that an agreement by a testator to convey an estate in fee to himself, would, for every purpose, be null and void: but the principle has not been followed up to this extent; for, in the case of *Vawser* v. *Jeffrey*, 16 Ves. 519, 2 Swans. 268, Sir W. Grant and Lord Eldon successively maintained the doctrine, that, if a surrender of copyholds to certain limitations (which have been already stated, vide ante, p. 105), would have revoked the will at law, the covenant to make such surrender revoked it in equity. And, though the assumption upon which this position was based, namely, that the surrender, if made pursuant to the covenant, would have been a revocation at law, was, in the subsequent stages of that case, decided to be unfounded; yet this circumstance

Conflicting opinions as to the revoking effect of a void covenant.

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does not necessarily affect the doctrine in question. There is some difference, however, in the line of reasoning pursued by these great contemporary Judges. Sir W. Grant, adopting the notion of his predecessor, held, that the covenantor was bound to convey the fee simple to himself, according to his covenant. While, on the other hand, Lord Eldon puts the doctrine rather upon the ground of intention. "It is contended," his Lordship observed, "that, if the widow had applied to this Court to have the covenant executed, the Court need not have directed any such acts as would have raised this question. My present opinion is, that I must consider the testator to have died with the intention which he expresses in this covenant, unless it can be shewn that he intended otherwise to execute his purpose of providing a jointure." Lord Eldon's observations shew that he considered the case as allied in principle to those (presently noticed) in which an ineffectual attempt to convey the devised lands has been held to revoke; though this view of it entirely differs from that of the Court of King's Bench, in the case of *Wright* v. *Littler*, 3 Burr. 1244; *S. C.*, 1 Blackst. 345, who thought that a void deed of covenant, was not a revocation, as it was not binding on the testator, and expressed no intention to make a present disposition. And, Lord Mansfield expressly lays it down, that covenants have never been allowed to be a revocation, unless where the covenantee has a right to specific performance—a principle which it seems very difficult to refute. In that case, however, the instrument in question was not a deed of covenant, but an unsealed paper, by which the testator "covenanted and agreed" that the lands in question should go and be given to certain persons, and the question was, whether it was testamentary: the Court decided in the negative, and that the paper was not a revocation of a previous will.

At all events, it is clear that a covenant to execute a conveyance, which, if made, would not have revoked the will at law, was inoperative to revoke it in equity: *Vawser* v. *Jeffery*, 3 Russ. 479.

Revoking effect of a contract for sale.

Another and an obvious case of the revocation in equity of a devise of lands occurred, where the testator contracted for the sale of them; *Mayer* v. *Gowland*, Dick. 563; such a contract, if originally binding on the testator, revoked the devise, though it happened to be rescinded subsequently to his decease; and also, by the better opinion, even though it was rescinded antecedently to that event. See *Knollys* v. *Alcock*, 7 Ves. 558; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170; [*Tibbet* v. *Voules*, 6 Sim. 40. See *Curre* v. *Bowyer*, 5 Beav. 6, n. And unless the contract goes off, it is, of course, equally an ademption under the new law.] The legal estate passes

under the devise, and the devisee is bound to carry the testator's contract into effect, by conveying the estate to the purchaser. If the devise, which might thus operate upon the legal inheritance, would have the effect of tying up the property in a manner incompatible with the convenient execution of the contract, as by creating limitations in favour of minors or unborn persons, the testator should, immediately after entering into the contract, execute a codicil vesting the property in trustees for the purpose of carrying the contract into effect.

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Suggestion.

Articles supported by the valuable consideration of marriage clearly had (and may now have) the same revoking effect in equity upon a previous devise of the property agreed to be settled, as a contract to sell. See *Cotter* v. *Layer*, 2 P. W. 624; *Vawser* v. *Jeffery*, 16 Ves. 519, 2 Swanst. 268.

—of marriage articles.

Another point proper to be noticed is, that, where a testator, who devises his real estate among his children in undivided shares, afterwards, upon the marriage of one of them, conveys or covenants to convey to uses, for the benefit of that child, an aliquot share, equal to that which he has devised to him or her, (no doubt intending to substitute it for the share so devised), such settlement or covenant does not revoke the devise of that entire share, there being nothing to connect or identify it with the settled share; but it revokes (or rather adeems) the devise of all the shares pro tanto, letting in the advanced child to participate equally with the others in the remaining shares not affected by the settlement. Thus, where a testator by his will gave one moiety of his real and personal estate to his elder daughter, and the other moiety to the younger daughter, and afterwards, upon the marriage of the elder with A., covenanted to settle one moiety of all his real estate to the use of himself for life, with remainder to A. and his intended wife for their lives, remainder to the younger children of the marriage in tail, remainder to A. in fee, it was held that this covenant revoked the will in equity as to one moiety of the testator's real estate, and that the other moiety passed under the devise in the will to the two daughters; and which was thought to be rendered still more clear by the republishing effect of a codicil executed after the articles: *Rider* v. *Wager*, 2 P. W. 334.

Suggestion where one of the devised shares is afterwards settled on the devisee.

[By the 23rd section of the recent statute, 7 Will. 4 & 1 Vict. c. 26, it is enacted "That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the

7 Will. 4 & 1 Vict. c. 26, s. 23.

Devise not to be revoked as to testator's disposable interest at decease by conveyance or like act.

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time of his death." See Mr. Jarman's observations on this section, 1 Jarm. Wills. 147, 148. Of course, a valid contract for the sale of an estate, made subsequently to a will containing a devise of it, revokes (or rather adeems) the devise, and augments the residuary personal estate to the disappointment of the devisee: *Farrar* v. *Winterton*, 5 Bea. 1; *Moor* v. *Raisbeck*, 12 Sim. 123.]

4. *Revocation by a void Conveyance.*

Revoking effect of void deeds of conveyance under the old law.

Sometimes an instrument, designed as a conveyance, but incapable of taking effect as such, operated, nevertheless, to revoke a previous devise. Such was the rule where the failure of the conveyance arose from either the incapacity of the grantee or the want of some ceremony which was essential to the efficacy of the instrument. Thus, in the case of *Beard* v. *Beard*, 3 Atk. 72, Lord Hardwicke decided that a deed of gift by the testator to his wife of personal estate which he had previously bequeathed by his will, revoked the bequest, though the deed was inoperative under the rule of the common law, which incapacitates the wife from taking property by way of gift from her husband. So, it has been often ruled, from a very early period, that a feoffment without livery of seisin and a bargain and sale without inrolment, operated as a revocation of a previous devise of the lands thus ineffectually attempted to be aliened. See *Montague* v. *Jeffries*, Moor. 429, pl. 599, 1 Roll. Ab. 615, pl. 6, 7. See also 3 Atk. 73; 1 Blackst. 349; 2 Swanst. 274. And the rule has been considered as applying to a common recovery, rendered void by the misnomer of the tenant to the præcipe, *Doe* v. *Bishop of Landaff*, 2 Bos. & Pull. New Rep. 491, and to an instrument purporting to be an appointment under a power which at the time was not in the testator: *Shove* v. *Pinke*, 5 T. R. 124, 310. In this case, indeed, it was thought that the instrument, if void as an appointment, might take effect as a grant of the reversion; but Lord Kenyon unreservedly stated, that, "even supposing it was an inadequate conveyance for the purpose for which it was intended, still, if it demonstrate an intention to revoke the will, it amounts, in point of law, to a revocation." And in the subsequent case of *Vawser* v. *Jeffery*, 2 Swanst. 274, Lord Eldon treated it as clear that an attempt by a testator to convey his copyhold estate by deed revoked a previous devise of that estate.

As to conveyances void under stat. 9 Geo. 2, c. 26.

It was held, however, that a conveyance to charitable uses, which was void by the stat. 9 Geo. 2, c. 26, on account of the grantor dying within twelve months after its execution, did not affect a prior devise, on the ground, it is presumed (for the reasons are not stated),

that the event of the grantor surviving the year was an implied condition annexed to the deed, the effect being the same as if he had expressly made his conveyance dependent on such a contingency: *Matthews* v. *Venables*, 9 Moore, 286, 2 Bing. 136.

Deeds by femes covert revoked wills under powers, when.

So, it has been decided, that a deed, executed by one who was under a personal incapacity to make the attempted disposition, had no effect in revoking a prior will; for, as the principle proceeded upon *intention*, a power to perform the act seems to be a necessary ingredient. Thus, where a feme covert, who had a power to appoint by will only, and had also the fee in default of appointment, made a will in pursuance of the power, and subsequently executed a deed professing to convey the lands, it was held that the deed was inoperative to revoke the testamentary appointment: *Eilbeck* v. *Wood*, 1 Russ. 564. But, if a feme covert, who had a power of appointing by deed or will, made a will in exercise thereof, and afterwards, by deed, in execution of her alternative power, directed her trustees to convey to her, which they accordingly did, of course the testamentary appointment was revoked: *Lawrence* v. *Wallis*, 2 B. C. C. 319.

Revoking effect of fraudulent deeds.

It seems clear, that a conveyance, which was void at law on account of fraud or covin, was not a revocation; but a different rule was formerly considered to apply in regard to deeds which were valid at law, though impeachable in equity. This distinction was laid down by Lord Hardwicke, in the case of *Hick* v. *Mors*, Amb. 215, where, a conveyance having been improperly obtained by an attorney from a sailor named Baldwin, his Lordship was of opinion, that it revoked a previous devise of the property by the latter, observing—"There is no doubt at law but that it is a revocation which depends upon intention; therefore, an imperfect conveyance is a revocation. Intent does not mean an intent to revoke, but to make a different disposition; so, a conveyance intended to strengthen the will, operates as a revocation. Baldwin meant to make a conveyance. *This is not like the case of a conveyance by covin, which would make it not his deed at law; that would be a nullity:* but here the whole passed, and could not be re-invested without a conveyance." But this distinction was disregarded in the subsequent case of *Hawes* v. *Wyatt*, 2 Cox, 263, 3 B. C. C. 156; where a deed, which the Court of Chancery decreed to be delivered up, as having been obtained by an oppressive exercise of the parental authority, was held by Lord Thurlow, reversing a decree of Sir R. P. Arden, M. R., not to be a revocation, on the ground that the Court, by ordering the deed to be delivered up, declared it to be no deed, and, therefore, it could not be a revocation. The Master of the Rolls appears, by his observa-

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tions in the case of *Ex parte Earl of Ilchester*, 7 Ves. 374, when Lord Chief Justice of the Court of Common Pleas, not to have been convinced by the reasoning of Lord Thurlow, before whom he said the case of *Hick* v. *Mors* was not adverted to; and Lord Eldon, in the case of *Attorney-General* v. *Vigor*, 8 Ves. 283, intimated that the cases of *Hick* v. *Mors* and *Hawes* v. *Wyatt* were contradictory; and that, until *Hawes* v. *Wyatt*, he had considered that there was a difference between deeds void at law and in equity; and his Lordship observed, that, if that case were right, "it must be supported upon this principle, *if any*, that where a man is induced by fraud, this Court considers him as having no will. He is compelled by fraud, as much as partition (which, it will be recollected, is not a revocation even at law) is compelled by the writ." The reader will probably see, in these strictures on Lord Thurlow's decision, ground for withholding his unreserved confidence in that decision. [In the case of *Simpson* v. *Walker*, 5 Sim. 1, it was decided by Sir L. Shadwell, V. C., that a deed executed under circumstances which rendered it void in equity and not at law, was a revocation of a prior will.]

[A question of this nature cannot arise in regard to wills made since 1837; the rule as to ineffective conveyances applying a fortiori to void conveyances.]

5. *Revocation by a subsequent revoking or inconsistent Will or Codicil.*

Wills made before 1838.

In considering this head of revocation, with reference to wills made before 1838, wills of freehold and personal estate must be distinguished. The difference between them was created by the Statute of Frauds, 29 Car. 2, c. 3, s. 6, which enacts, "that no devise in writing of *lands, tenements, or hereditaments*, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or more witnesses, declaring the same, any former law or usage to the contrary notwithstanding."

Stat. 29 Car. 2, c. 3, s. 6.

Devises of lands, how to be revoked.

Bequests of

The same statute, sect. 22, provides, "That no will in writing

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concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least."

personalty how to be revoked.

Unless these enactments had placed the revocation of wills under positive restrictions, they might still have been revoked as before the statute, notwithstanding the solemnities imposed by it on their execution; since there is no necessary implication that what is required to the execution of an instrument is essential to its revocation. Hence, before the Statute of Frauds, it was held that a will, required to be in writing by the statute of 34 Hen. 8, c. 5, might be revoked by parol: *Cranvel* v. *Sanders*, Cro. Jac. 497; and it has been decided, that a testamentary appointment of guardians, for which two attesting witnesses were required by the statute of 12 Car. 2, c. 14, s. 8, (ante, p. 25), might be revoked by an unattested will: *Ex parte Earl of Ilchester*, 7 Ves. 348. And, on the same principle, where a power required a will to be executed and attested in a particular manner, it might have been revoked by a will, sufficient by the general rule for the disposition of the property, though such will might be incapable of again disposing of it under the power: *Richardson* v. *Barry*, 3 Hagg. 249.

Difference between devising and revoking clauses.

Though the Statute of Frauds required that a will which revoked a devise of lands should be attested by the same number of witnesses as a will devising them, yet in some particulars the formalities prescribed were different in the several instances. First, a devising will was required to be subscribed by the witnesses in the testator's precence, which a revoking instrument was not; and, secondly, a revoking instrument was required to be signed by the testator in the presence of the witnesses, while a devising needed not to be signed in their presence; each, therefore, had a circumstance not applicable to them in common. This difference, however, which probably occurred without design, was attended with very little practical result, for it seldom happened that an instrument was executed for the mere purpose of revoking a previous will; and if it contained a new disposition, any revoking clause therein was a nullity, whether the substituted devise took effect or not, though for widely different reasons in the two cases. If the devise with which the clause in question was associated was effective, it reduced the latter to silence by rendering it unnecessary, the new devise itself producing the revocation; so that the efficiency of the will, as a revoking instrument, could not in

Revocation dependent on efficiency of substituted disposition.

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such a case become a subject for consideration. If the new devise was ineffectual, on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause was inoperative on another principle, namely, that the revocation was dependent on and failed with the attempted new disposition, the purpose to revoke being considered to be not a substantive independent intention, but subservient to another purpose for which the instrument was incompetent, the testator meaning to do the one so far only as he effected the other: *Eggleston* v. *Speke*, Carth. 79, 1 Show. 89; *Onions* v. *Tyrer*, 2 Vern. 441, 1 P. W. 343; [*Locke* v. *James*, 11 Mee. & W. 101.] See also *Ex parte Earl of Ilchester*, 7 Ves. 348; *Kirke* v. *Kirke*, 4 Russ. 435. But see *Richardson* v. *Barry*, 3 Hagg. 249.

Revocation where devise intended to be substituted fails.

But it seems, that, if the second devise failed, not from the infirmity of the instrument but from the incapacity of the devisee, the prior devise was revoked, notwithstanding that the gift intended to be substituted was of no effect: *Frenche's case*, 1 Roll. Ab. 614 (O), pl. 4; *Roper* v. *Constable*, 2 Eq. Ca. Ab. 359, pl. 9; *S. C.* nom. *Roper* v. *Radcliffe*, 5 B. P. C. Toml. ed. 360; [*Short* v. *Smith*, 4 East, 418.]

Revocation of wills of personalty.

With respect to the revocation of wills of personal estate, it is to be observed that questions concerning it most commonly occur in the Ecclesiastical Courts; which, of course, no less than the Temporal Courts, were bound by the 22nd section of the Statute of Frauds, excluding parol revocations. Accordingly, Sir J. Nicholl held, that evidence could not be received of the testator's intention, orally announced, to adopt the prior of two wills, both which were found at his decease uncancelled, though it appeared that most of the bequests in the posterior will had lapsed: *Daniel* v. *Nockolds*, 3 Hagg. 777. But the enactment in question was not considered to interfere with the reception of evidence of acts of a testator in his lifetime concerning his testamentary papers, still less to exclude inquiry into the state in which such papers were found at his decease. [Where a testatrix caused a letter to be written, desiring that her will might be destroyed, this was held to be a revocation, though the will was not destroyed: *Walcott* v. *Ochterlony*, 1 Curt. 580.]

As to completeness of revoking will.

Revocation often depended on the completeness of the posterior of two testamentary papers, in regard to which it may suffice to refer to what has been stated in a former section respecting the necessity of every intended (though possibly in itself superfluous) solemnity of execution being perfected (ante, p. 68), with the additional remark, that an unfinished paper had to struggle with an increased

force of objection, where its operation went to disturb the dispositions of a previous complete and duly executed will. See *Griffin* v. *Griffin*, 4 Ves. 197, n.

We proceed now to the consideration of the revoking *contents* of a subsequent will and codicil; and as, in this point of view, wills of freehold and personal estate [under the old law, and wills within the operation of the new law] are referable to the same general principles, the decisions respecting them have been blended. Of course, a mere intimation by a testator of his intention to make, by a future (*a*) act, a new disposition, does not produce actual revocation. Thus, where A. made a will, disposing of his real and personal property, and afterwards, the residuary legatee of the personalty being dead, and A., having acquired other real property, made another will, whereby he devised the newly-acquired property, and then wrote as follows:—"As to the rest of my real and personal estate, I *intend* to dispose of the same by a codicil to this my will hereafter to be made;" it was contended that this clause, though inoperative as a disposition, indicated an intention to revoke the will; but Lord Ellenborough and Mr. Justice Lawrence held that it was not a revocation. They considered the cases before the statute to be applicable; and that the testator merely intended to dispose of the subsequently-acquired real estate, and the property which had lapsed by the death of the residuary legatee; and that, even if this had imported an intent to revoke by making a *different* disposition in future, it would not, according to the authorities, have amounted to a revocation, unless the Court could ascertain what the difference was: *Thomas* v. *Evans*, 2 East, 488. See also *Griffin* v. *Griffin*, 4 Ves. 197, n. Nor is it sufficient, in order to revoke a will, that the existence of a subsequent will should have been found by a jury; it must be found to be different from the former; *Seymor* v. *Nosworthy*, Hard. 374; *S. C.* Show. P. C. 146; and even the latter finding will not avail, if it be added, that the nature of such difference is unknown to the jurors: *Goodright* v. *Harwood*, 3 Wils. 497; 2 Blackst. 937, Cowp. 87, 7 B. P. C. Toml. ed. 489.

Mere intention to revoke by a future act inoperative.

Where a testator at different periods of his life has made various testamentary papers, some of which he destroys and others he leaves undestroyed, each professing to contain his last will, this character

Rule where several wills are subsisting at death.

(*a*) [In an early case a distinction is taken between the effect of a testator saying, "I will revoke my will at P.," and saying, "my will at P. shall not stand," the former referring to a future act, and not being considered a revocation; the latter indicating a present resolution, and being considered an actual revocation: *Burton* v. *Gowell*, Cro. El. 306.]

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belongs exclusively to such one of the uncancelled papers as was executed most proximately to his decease; see *Goodright* v. *Glazier*, 4 Burr. 2512; *Harwood* v. *Goodright*, Cowp. 92; and in order to ascertain the time of the execution of the respective papers, recourse may be had to evidence drawn either from their own contents or from extrinsic sources. Sometimes the water-mark, shewing when the paper on which a will is written was manufactured, affords decisive proof of its posteriority to another will, the period of whose execution can be ascertained by some other means; I say by *other* means, because the date of the manufacture of the paper, of course, only negatives its earlier origin, and does not prove its *priority* to any other paper. [And even for the former purpose its evidence is not to be trusted to establish a difference of date of a few months only, as paper bearing the water-mark of a certain year, is often made and sold some months before that year arrives.]

Effect of contradictory wills of uncertain date.

If, from the absence of date, and of every other kind of evidence, it is impossible to ascertain the chronological relation of two wills, both are necessarily void, and the heir as to the realty, and the next of kin as to the personalty, are let in; but this unsatisfactory expedient is never resorted to until all attempts to educe from the several papers a scheme of disposition consistent with both, have been tried in vain. See *Phipps* v. *Earl of Anglesea*, 7 B. P. C. Toml. ed. 443. And even where the times of the actual execution of the respective papers are known, so that, if they are inconsistent, there can be no difficulty in determining which is to be preferred, the Courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier, so far only as it is clearly incompatible with the later paper: *Weld* v. *Acton*, 2 Eq. Ca. Ab. 777, pl. 26.

The inclination to such a construction as would preserve, either wholly or in part, the contents of the prior paper, however, exists only when the subsequent paper is inadequate to the disposition of the entire property, so that the consequence of rejecting the prior paper would be to produce partial intestacy, or when the subsequent paper is styled a codicil; for the office of a codicil being to vary, and not wholly supplant a previous will, such a denomination of the instrument seems to demand that some part, at least, of the will, whose existence it supposes and recognises, should, if possible, be sustained.

Questions often raised by codicils.

Numerous are the questions which have been raised in regard to the extent to which a codicil affects the dispositions of a will, or antecedent codicil, and which are often occasioned by the person framing the codicil not having an accurate knowledge or recollection

of the contents of the will or previous codicil, forcibly suggesting, therefore, the propriety of never preparing a codicil without an actual inspection of the will or codicil whose operation it is designed to alter. All that can be attempted here is, to glance at a few points exemplifying the principles of construction which have obtained in these cases. A primary rule, obviously, is not to disturb the dispositions of the will, farther than is absolutely necessary for the purpose of giving effect to the codicil. [See *Doe* d. *Murch* v. *Marchant*, 7 Scott, N. R. 644; *Vesey* v. *Vesey*, 12 Jur. 548.]

Thus, where a testator by his will devises lands to A. in fee, and by a codicil devises the same lands in fee to the first son of B. who should attain the age of twenty-one and should assume the testator's name, the first devise would be revoked only quoad the interest comprised in the executory devise in the codicil; so that, until B. had a son who attained his majority, and assumed the testator's name, the property would pass to A. under the devise in the will: *Duffield* v. *Duffield*, 3 Bligh, New Ser. 261.

Will revoked by codicil pro tanto only.

So, where a testator devises lands to A., subject to a rent-charge to B., and then by a codicil revokes the devise to A. of the land, which he gives to another, without noticing the rent, the latter remains a charge on the land in the hands of the substituted devisee *Beckett* v. *Harden*, 4 Mau. & Selw. 1.

The principle may be farther illustrated by the following cases. A testator devised his estates to C. B. for life *without impeachment of waste*, and by a codicil directed his trustees to let, until tenant for life married, the leases to be *impeachable of waste*, and the rents to be accumulated and laid out in lands to be settled to the same uses: it was contended, that this was inconsistent with, and therefore revoked, the devise for life without impeachment of waste: but Sir W. Grant, M. R., held, that there was no inconsistency, and nothing to take the timber from the tenant for life: *Lushington* v. *Boldero*, Geo. Coop. 216.

So, where a testator, by his will, bequeathed as follows—"As to my leasehold house in S., and my household goods and furniture there and at S., and as to all my plate, linen, china-ware, pictures, live and dead stock, and all the rest and residue of my goods, chattels, and personal estate," he gave the same to A. By a codicil he revoked the bequest of the *residue* of his personal estate to A., and gave the same to B. It was held that the revocation was confined to the residue, and did not extend to either the leasehold house and furniture, or the other enumerated articles, namely, the plate, &c.: *Clarke* v. *Butler*, 1 Mer. 304.

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[So, where a testator appoints several persons to be executors and trustees, and guardians of his children, and by a codicil revokes the appointment of one of them as executor and trustee, and appoints another executor and trustee in his place, this does not affect the guardianship: *Re Parke*, 14 Sim. 89.]

Estates A. and B. are devised to the same uses: Revocation as to A. does not affect B.

It may be observed, that, where a testator, to avoid unnecessary repetition, has by his will declared his intention respecting a property which he was then devising to be similar to what he had before expressed concerning another property antecedently given, and he afterwards, by a codicil or any other act, revokes his first gift, such revocation does not affect the second devise. Thus, where a testator, by his will, annexed one estate to another, declaring that the same should go unto and be enjoyed by the possessor of the other estate, and not be separated therefrom, and by an act in his lifetime he revoked the devise of the principal estate, the property so annexed was held not to be affected, but went according to the uses declared of the principal estate by the will: *Darley* v. *Langworthy*, 3 B. P. C. Toml. ed. 359, reversing Lord Camden's decree in *Darley* v. *Darley*, Amb. 653. See also *Lord Sidney Beauclerk* v. *Mead*, 2 Atk. 167.

So, where a testator bequeathed a specific fund to his residuary legatee after named, and then bequeathed the residue to A., and by a codicil revoked the bequest of the residue; it was held that this was no revocation of the specific bequest: *Roach* v. *Haynes*, 6 Ves. 153.

Again, where a testator by his will devised certain freehold property (on failure of the objects of a preceding devise) to trustees to be sold, and directed the produce to be applied upon the trusts hereinafter expressed concerning his residuary personal estate; he then bequeathed his residuary personal estate upon certain trusts, and afterwards, by a codicil duly attested for devising freehold estates, revoked the residuary bequest, and disposed of the personalty in a different manner—Sir J. Leach, M. R., held, that, by this alteration in the disposition of the personal estate, the devise of the realty was not affected, the effect being the same as if the testator had in terms applied the trusts in question to the produce of the freehold estate; in which case it is obvious that the revocation by the codicil of the residuary gift of the personal estate by the will would have been no revocation of the disposition of the produce of the freehold estate; and his Honor observed, it could make no difference in principle, that the testator saves himself the trouble of repeating those trusts, intents, and purposes, by compendious words of reference: *Francis* v. *Collier*, 4 Russ. 33.

Where the devise of the principal estate is not simply revoked, but is modified, we are not too hastily to conclude that the construction adopted in the class of cases just stated would apply, however forcibly the reasoning in some of them, and especially that of the Master of the Rolls in the last case, might seem to conduct to such a conclusion; for, a different construction prevailed in the case of *Lord Carrington* v. *Payne*, 5 Ves. 404, where a testator devised his real estate to trustees to be conveyed to certain uses, and bequeathed personal estate, to be laid out in land to be settled "*to such uses, and upon such trusts, &c. as he had declared concerning his real estate.*" By a codicil, he revoked so much of his will as directed the settlement of his real estate to those limitations and devised it to other limitations, the effect being merely to change the order in which some of the devisees were to take. Sir R. P. Arden, M. R., held, that the bequest of the personalty was not revoked, [but was modified by the codicil.] He considered, that, though the devisor had used the expression "revoke," yet the codicil was not a revocation as to the union of the estates, but merely an alteration in the order of the limitations to be inserted in the settlement (of both properties); and it was no more than if the devisor had, with his own hand, inserted the name of one devisee before another.

Distinction where the first devise is modified only.

Unless the case of *Lord Carrington* v. *Payne* can be referred to the distinction above suggested, which is very doubtful, it seems to be untenable.

Where a testator, in a codicil to his will, recites an inconvenient consequence to result from a devise in his will, as that, in a particular event, the devisee or legatee would be unprovided for, contrary to his intention; and then, instead of confining himself to simply effecting the declared purpose of the codicil, he proceeds to revoke the whole devise, giving the land again to the same trustees upon certain trusts, which he particularises, and which are the same as the former trusts, with the exception of the particular expressly intended for correction, and of one other of the trusts, which he wholly omits; this omission, though probably undesigned, cannot be supplied: *Holder* v. *Howell*, 8 Ves. 97. The principle of this case seems to be inconsistent with, and it may therefore be considered to have overruled, the case of *Matthews* v. *Bowman*, 3 Anst. 727, where a testator, having devised the residue of his estate to his daughters *as tenants in common*, by a codicil made for a particular purpose redevised it to them, but *omitting the words of severance*, it was held that the legatees were tenants in common.

Absolute revocation held not to be restrained by recital.

And here it may be observed, that where a testator, by a codicil,

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revokes a devise or bequest in his will, stating, as the ground for such revocation, a fact which turns out to be false, the revocation does not take effect, being made, it is considered, to depend on a condition which fails. Thus, where a testator, having bequeathed to the two grandchildren of his late sister 500*l.* each, by a codicil declared that he revoked the legacies bequeathed by his will to such grandchildren, "*they being all dead*," it being proved that they were living, Lord Loughborough held that the legacies were not revoked: *Campbell* v. *French*, 3 Ves. 321. Had the testator in this case, instead of assuming the death of the legatees, founded his revocation on his advice or belief only of the fact, it is conceived that the decision would have been different. This distinction has been suggested, and seems to be warranted by the case of *Attorney-General* v. *Lloyd*, 3 Atk. 552; *S. C.*, 1 Ves. sen. 32, where a testator, before the passing of the statute of 9 Geo. 2, c. 36, having devised lands and bequeathed personalty to be laid out in lands for charitable uses, by a codicil made *after* the passing of the statute, reciting that, being advised the devise of his lands would be void, and it being his intention that the charity should be continued, and being advised his personal estate could be given, he did thereby give his personal estate to the charitable uses before mentioned, and he did thereby give his real estate to B. It was held, that the lands were effectually devised to B., though the testator's impression as to the invalidity of the devise in the will was erroneous: *Willett* v. *Sandford*, 1 Ves. sen. 178, 186.

So, where a testatrix by her will bequeathed 300*l.* among such of the children as should be living of E., and by a codicil declared as follows, "I give to my brother's son, C., the 300*l.* designed for E.'s children, *as I know not whether any of them are alive, and if they are well provided for:*" Sir R. P. Arden, M. R., held C. to be entitled, though the children of E. were living. His Honor, however, observed, "that it was argued, and with some ground, that if it rested upon her not knowing whether they were living, there would be some reason to contend that it fell within the case (so often cited from Cicero de Oratore) of pater credens filium suum esse mortuum alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est nulla: but the testatrix goes further, that she doubted, if they were living, whether they might not be well provided for; and she totally deprives them of that provision. The Court will not inquire whether they are well provided for or not:" *Attorney-General* v. *Ward*, 3 Ves. 327.

Whether lega-

Questions often arise whether legacies bequeathed by a codicil are

payable out of the same fund, or are subject to the same restrictions as legacies bequeathed by the will. If the legacies are expressly given upon the same conditions, &c., of course the affirmative does not admit of doubt: *Lloyd* v. *Branton*, 3 Mer. 108. And where a testator, by his will, gave to his niece 1000*l.* to be paid to her at his decease if she were married, and if not the interest to her for life and the principal to her at her marriage. By a codicil the testator gave to the same niece 200*l.* *in addition to what he had given her by his will.* Sir R. P. Arden, M. R., held that the second legacy was to be raised out of the same fund, and was subject to the same conditions as the legacy by the will: *Crowder* v. *Clowes*, 2 Ves. jun. 449. In some instances the same construction has prevailed on less palpable indication of similarity of intention in regard to the respective legacies or classes of legacies: *Brudenell* v. *Boughton*, 2 Atk. 268; *Leacroft* v. *Maynard*, 1 Ves. jun. 279; *Fitzgerald* v. *Field*, 1 Russ. 425. [Where a testator by his will gave a fund in trust for the separate use of his three nieces for life, with a trust in remainder for their children, and by a codicil directed that each of his nieces should have a vested interest transmissible to her children upon her death, it was held that they took absolutely for their separate use: *Vesey* v. *Vesey*, 12 Jur. 548.]

cies by codicil follow those given by will.

A point which has been agitated, perhaps, more frequently than any other, is, whether a legacy bequeathed by a codicil is to participate in an exemption from duty, created by the will in favour of the legacies thereby given, or of some particular legacy for which the legacy in question is substituted. According to the cases, there must be a distinct manifestation of intention in the codicil in order to exempt the legacy. (Vide ante, Vol. 9, p. 787); [*Early* v. *Benbow*, 2 Coll. 354. See also 1 Jarm. on Wills, 169, &c., and 169 n. (*x*), as to what expressions will exempt legacies from duty.]

Whether legacy by codicil is exempt from duty like those of will.

Sometimes a codicil has the effect of impliedly revoking the posterior of two wills (*a*), by referring to the prior one as the actual and subsisting will of the testator.

Revoking effect of codicil by republishing an earlier will.

Thus, if a testator makes a will in 1820, and another in 1830, both of which, though inconsistent, remain undestroyed, and the testator then makes a codicil, which he declares to be a codicil to his will of 1820, this would set up the will of 1820, in opposition to that of 1830: *Lord Walpole* v. *Earl of Orford*, 3 Ves. 402; *S. C.*, nom. *Lord Walpole* v. *Lord Cholmondeley*, 7 T. R. 138; and parol

(*a*) Strictly speaking, nothing is the will of the testator which is not subsisting at his death; but, in discussing questions of this nature, it is impossible to avoid using the word in its less appropriate sense.

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evidence that he intended to refer to the will of 1830 would be inadmissible: *Crosbie* v. *Macdoual*, 4 Ves. 610. An inaccuracy in referring to the date of the first will would not prevent the application of this doctrine, unless it raised a doubt as to which was really intended: *Jansen* v. *Jansen*, cit. 1 Addams, 139. The fact that the codicil is written on the same sheet of paper as the first will has been considered, in regard to personal estate at least, to indicate an intention to treat *that* as the subsisting will, especially as the second was out of the testator's possession, so that he had no opportunity of cancelling it: *Rogers* v. *Pittis*, 1 Addams, 30. See also Lord C. B. Eyre's judgment in *Barnes* v. *Crowe*, 1 Ves. jun. 488.

Every codicil deemed part of will.

In applying the doctrine of *Lord Walpole's case*, it is necessary to bear in mind that every codicil is a constituent part of the will, which in a general and comprehensive sense consists of the aggregate contents of all the papers through which it is dispersed. Such a construction of the term "will," of course, prevents the confirming act of the testator from having the effect of setting up the will (using the word in its more confined sense), in contradistinction to, and in exclusion of any intermediate codicil or codicils which the testator may have engrafted on it. And, therefore, in a case where a person made his will, and afterwards executed several codicils thereto, containing partial alterations of and additions to the will; and by a further codicil, *referring to the will by date*, he changed one of the trustees and executors, and in all other respects expressly confirmed *the will;* this confirmation of the will was held not to revive the parts of it which were altered or revoked by the former codicils; Sir R. P. Arden, M. R., observing, that, *if a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it*: *Crosbie* v. *Macdoual*, 4 Ves. 610. [See *Gordon* v. *Reay*, 5 Sim. 274; *Wade* v. *Nazer*, 12 Jur. 188.]

The case of a codicil referring to the earlier of two existing wills belongs equally to the learning of revocation and republication, as the revocation of the posterior will is effected by the republication of the prior will, and may, therefore, aptly serve as a sort of stepping stone to the subject of republication, which next comes under consideration.

[In regard to wills made since 1837, Mr. Jarman thinks that such questions may still occur, "for" he observes, 1 Treat. on Wills. 173, "though the 22nd section of the recent statute prevents the revival of a revoked will, except by re-execution, or by 'a codicil shewing an intention to revive the same,' and, therefore, no such effect would follow from the *mere* revocation of a posterior revoking

will; yet, probably, it would still be held, according to the doctrine of Lord Orford's case, that a recognition in a codicil of the earlier of the two inconsistent and undestroyed wills, by date or otherwise, as the will on which the codicil is founded, shews an intention to revive the will."] REVOCATION.

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Nature and effect of republication.

Republication is, in fact, re-execution, being a repetition of those ceremonies which are essential to the original efficacy of the will; so that, to republish the devise of a freehold estate, required an attestation by three witnesses; while a will might have been republished with respect to copyholds and personalty without any attestation (*a*). It was rarely necessary, however, to inquire into the republication of wills of personal estate, for this reason, that, as a residuary *bequest* even before the recent act, embraced all the property of which the testator died possessed, it was not generally susceptible of enlargement by republication, whose effect is only to make the will speak from the period of its being republished, which, in regard to real estate, was often an important consideration; because, otherwise, the devise operated only on the property of which the testator was seised at the time of its execution (*b*). Thus, if a man devised all his real estates to A. and his heirs, and afterwards purchased freehold or copyhold lands of inheritance, and then republished his will, the purchased estate passed to the devisee by the effect of the republication: *Acherley* v. *Vernon*, Com. 381, 2 Eq. Ca. Ab. 769, pl. 1, 3 B. P. C. Toml. ed. 85; *Potter* v. *Potter*, 1 Ves. sen. 437. And, pari ratione, if the devise were of the testator's real estates in Kent, an estate in that county bought by or descended to the testator after the execution and before the republication of the will passed: *Beckford* v. *Parnecott*, Cro. Ell. 493; *Barnes* v. *Crowe*, 1 Ves. jun. 486, 4 B. C. C. 2. [See 1 Wms. Saund. 277, n.]

Republication actual and constructive.

Republication by codicil.

Republication is of two kinds, express and constructive. Express republication, as already noticed, is merely the repetition of the ceremonies which constitute an execution of the will. Constructive republication takes place where a testator makes a codicil to his will, the effect of which, if the codicil be duly attested, is to republish the will, and thereby under the old law to bring within any general or

(*a*) As to the republication of wills of personalty under the old law, vide *Long* v. *Aldred*, 3 Addams, 48; *Miller* v. *Brown*, 2 Hagg. 209.

(*b*) Vide ante, p. 35.

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residuary devise which it might contain lands of inheritance acquired since the execution of such will, though the codicil express no intention to republish, or though it be not annexed to, or declared to be a part of, or do not in terms confirm the will, and (under the old law) whether the codicil related to real estate or to personalty only, the result being precisely the same as if the general or residuary devise had been incorporated into the republishing codicil. Thus, where a testator, being seised of two-thirds of the manor of Chesterton, devised all his manors and lands (enumerating, among others, Chesterton,) to trustees, and then purchased and took a conveyance of the other third of the manor, and afterwards made a codicil to his will, attested by three witnesses, which he styled a codicil to be annexed to his last will and testament, and made part thereof to all intents and purposes; but the whole purport of it was to revoke a bequest in the will to one of his daughters. The codicil was not annexed. Sir W. Grant, M. R., held that this was a republication: *Pigott* v. *Waller*, 7 Ves. 98.

General devise extended by republication to intermediately-acquired lands.

So, where a testator, having by a will duly attested devised all his lands, subsequently purchased a freehold estate, and then by a codicil, attested by three witnesses, devised certain freehold property, but not the purchased estate, it was treated as quite clear that the latter passed under the will by the effect of the republication: *Goodtitle* v. *Meredith*, 2 Mau. & Selw. 5.

Again, where a testator, by a will duly attested, devised all his lands to certain uses; and then executed two codicils, attested by two witnesses only, both which contained directions respecting his real estate, and afterwards executed a third codicil, which was attested by three witnesses, but merely contained an appointment of an executor in the room of one of the executors appointed by the second codicil—it was held to be clear (among other points that were more doubtful) that this codicil republished the will, so as to make the general devise operate upon an after-purchased estate: *Guest* v. *Willasey*, 12 Moore, 223. See also *Doe* v. *Davy*, Cowp. 158; *Gibson* v. *Montfort*, 1 Ves. sen. 485.

Express devise of part to residuary devisee did not negative his claim to the rest.

It has been held, under the old law, that the circumstance of the testator having, by the codicil, expressly devised part of his estates, purchased since the execution of the will, to the uses therein declared concerning his residuary real estate, did not exclude the rest from the operation of the same residuary devise brought down by the republishing effect of the codicil to the date of such codicil: *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Hulme* v. *Heygate*, 1 Mer. 285. Indeed, when we admit that the effect of the republication is to make the will

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speak from the period of the execution of the codicil, it seems necessarily to follow that an express devise in the codicil of particular lands, acquired since the execution of the will, to the residuary devisee, could no more exclude the rest from the residuary devise thus republished, than a similar devise in the will itself could prevent other lands, then belonging to the testator, from passing to him under such residuary clause.

Case of *Rowly* v. *Eyton*.

Perhaps, in no instance, has the republishing operation of a codicil been carried to so great a length as in the case of *Rowley* v. *Eyton*, 2 Mer. 128, where after-acquired lands, expressly devised by the codicil to the residuary devisee of the will, were held to be subject to a general charge of debts created by the will. The testator, after charging his real and personal estate with the payment of his debts, devised the residue of his real and personal estate to his son E., and, having subsequently purchased several copyhold estates, by a codicil attested by three witnesses, *devised them to his said son in fee*—Sir W. Grant, M. R., held that the codicil was a republication of the will, so as to make the after-purchased lands subject to the devise for payment of debts. Perhaps, it is not quite clear that the decision would have been the same if the codicil had devised the lands in question to any other person than the residuary devisee in the will (*a*).

Whether a charge of legacies extends to lands specifically devised.

(*a*) This case evidently supposes that a general charge of debts extends to lands specifically (or, to speak more accurately, to lands particularly) devised, as well as to those which pass by the residuary devise—a point that was much discussed (the charge, however, being of legacies instead of debts) in the case of *Spong* v. *Spong*, 1 You. & Jerv. 300; 3 Bligh, N. S., 84, where a testator, after devising lands to various persons, and having charged his real and personal estate with his legacies, and then bequeathed some legacies, gave the residue of his real and personal estate to A. The Court of Exchequer held the legacies to be charged as well upon the lands specifically devised as the lands forming the residue; but the House of Lords reversed this part of the decree. Lord Manners argued at some length in favour of this reversal, contending that, in construing charges of this nature, specific and residuary devises, though for many purposes governed by a common principle, were to be distinguished, especially as, in the case under consideration, the testator had shewn such a distinction to be in his view by devising particular lands to the person whom he made residuary devisee. His Lordship intimated that the opinions of Lord Eldon and Lord Redesdale coincided with his own. Some of Lord Manners's reasoning would have applied to *Rowly* v. *Eyton*, where it might have been contended that the testator, by expressly devising by the codicil the lands in question to the residuary devisee, shewed that he intended to distinguish them from the lands comprised in the residuary devise. It is to be regretted, therefore, that this case was not cited in the House of Lords, though possibly it might not have shaken the opinion of the noble Ex-Chancellor of Ireland, who considered that a charge of debts and legacies stood upon a different footing, as appears also to have been the notion of Lord Alvanley on several occasions. (Vide 2 Ves. jun. 328, 3 Ves. 739, 5 Ves. 359).

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Effect of republication negatived by the contents of the codicil.

But, of course, the operation of a codicil to extend the devise in a will made before 1838 to intermediately acquired lands, may be negatived by the language of the codicil itself, indicating a contrary intention; for, though the republication takes place without any positive expression of intention, yet it can never operate in spite of the intention. The leading case of this class is *Bowes* v. *Bowes*, 7 T. R. 482, 2 Bos. & Pull. 500; which was as follows:—G. Bowes, Esq., in 1749, devised all his lands and hereditaments (with certain exceptions not here material to be stated) to his wife and five other persons in fee, upon certain trusts. In 1754, he bought, and became seised of, an undivided part of a freehold property. In 1758, by a codicil duly attested, reciting that he had by his will devised all his lands and hereditaments to his wife and the other persons (naming them) upon trust, he thereby revoked all the above devises, so far as related to two of the trustees; and he thereby gave and devised his SAID *lands, tenements, and hereditaments* to the remaining trustees, (naming them), their heirs and assigns, upon the same trusts and purposes as he had devised the same by his will, at the same time revoking the legacies he had given to the removed trustees; and the testator concluded with declaring the codicil to be part of his will. Lord Loughborough sent a case to the Court of King's Bench, with the question whether the codicil was a republication; and that Court certified in the negative, (7 T. R. 482), which was in effect confirmed by his Lordship's order. The case was then carried by appeal to the House of Lords; and the question was put to the Judges, who were unanimously of opinion that the will was not republished, even to pass lands acquired between the will and codicil; on the ground that the word "said" confined the operation of the codicil to the lands which had actually been devised by the will. Lord Thurlow (formerly Lord Chancellor) alone dissented; his Lordship's argument being, that the testator, when he recited his having devised all his lands, supposed his after-purchased would pass, and that the words "*my said lands*" referred to what he had supposed he had conveyed. Lord Eldon, however, shewed that the House ought to decide the question as if the testator actually *did* know that the will had not passed the after-purchased lands: that when, in the codicil, he referred to the will as having passed all his lands, he did no more than recite his former devise; but that, when he came to the operative part of the codicil, he changed the tense of the verb; and, though, in the former part, he said, "Whereas, I have devised," &c., yet, in the latter, he said, "I do hereby revoke, and I do hereby give and devise." If, therefore, by the former words,

Devise in republished will, not extended to lands intermediately acquired.

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"all my freehold and copyhold lands," the testator were understood to include all the after-purchased lands, by the latter words of the codicil he must be understood to be revoking a devise of these lands which he had not at the time the will was made; *for his expressions of revocation were co-extensive with the expressions of devise;* these expressions, therefore, unless explained by the context, would be unintelligible: but the word "said" clearly shewed that they were both intended to be confined to the lands which the testator possessed at the time of the will, and this construction rendered them consistent.

So, where a testator, having by his will devised his real estate, and subsequently acquired other lands by descent, but supposing them to have passed to him and his sons in strict settlement by the will of the last owner (which, however, turned out to have been revoked by a common recovery), he, by a codicil, altered certain limitations in his will *for the express purpose of preventing the union of his own estates with the estates supposed to be devised;* the Court concurred in the argument, that the language of the codicil negatived the application of the devise in the will to the property in question: *Parker* v. *Biscoe,* 3 J. B. Moore, 24, 8 Taunt. 699.

Again, where a testator, who had by his will devised to his wife certain lands and all his residuary real and personal estate, by a codicil devised and bequeathed, in case his wife should die before him, all his *said* lands and real estate, and also all his personal estate, to trustees, upon certain trusts—Lord C. B. Alexander was of opinion, on the authority of the case of *Countess of Strathmore* v. *Bowes,* that the codicil was not a republication of the will so as to make it pass estates purchased by the testator between the making of his will and of his codicil: *Smith* v. *Dearmer,* 3 You. & Jerv. 278.

Lastly, where a testator having, by his will, after certain particular devises, devised all the residue of his real estate to his brothers, A., B., and C., by a codicil, reciting that he was desirous of making a more liberal provision for his wife, and that she might enjoy the whole of his real estates for her life, gave certain lands to his wife, which, by his will, he had given to his brothers, and then devised a certain property and all other *the real estate which, by his will, he had given to his brothers,* in trust (inter alia) for his wife for life, and, subject thereto, upon the trusts declared by his will—it was held by Sir J. Leach, M. R., and afterwards, on appeal, by Lord Brougham, C., that notwithstanding the generality of the testator's recited intention respecting his wife, the terms of the dispositive part of the codicil prevented its operating to republish the residuary devise in the will, so as to comprise two freehold houses which the testator had, since its execution, acquired:

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Monypenny v. *Bristow*, 2 Russ. & M. 117. [In the case of *Ashley* v. *Waugh*, 4 Jur. 572, where a testator, by his will, devised all his real estate to A. and B. upon trust for sale, and, by a codicil, after reciting this devise, he revoked the appointment of A., and appointed C. to be a trustee and executor of his "said" will; the Lord Chancellor thought that this case came so near to that of *Bowes* v. *Bowes*, that he could not make a purchaser take a title which required a distinction to be made between the two cases. But see *Williams* v. *Goodtitle*, 10 B. & Cr. 895; *Doe* d. *York* v. *Walker*, 12 Mee. & W. 591; *Cole* v. *Scott*, 12 Jur. 509. In *Ashley* v. *Waugh*, the codicil recited the will as containing a devise of "such part of my estate as is therein mentioned" to the trustees.]

Effect of republication on particular devises.

Hitherto, republication has been viewed only as affecting general devises. In regard to particular devises, the principle, that the will speaks from the date of the republication, is to be received with more qualification and reserve. Unquestionably, the devise of a particular property republished by the re-execution of the will or the execution of a codicil would, even under the old law, comprise a new estate in that property intermediately acquired by the testator, and falling within the terms of the republished devise, but did not operate on a property different from that which the devise was originally designed to embrace, though answering to the same description. Thus, in a case under the old law, where a testator, having a renewable leasehold estate, devised it, afterwards renewed the lease, and then republished the will, the renewed lease passed under the devise: *Carte* v. *Carte*, 3 Atk. 180. See also *Alford* v. *Earle*, 2 Vern. 209. So, where a testator, by such a will, devised certain freehold lands, which devise was revoked by a conveyance of the lands to particular uses, with the ultimate limitation to the use of the testator himself in fee, after which the testator made a codicil to his will, attested by three witnesses; the estate which reverted to the testator on the execution of the revoking conveyance passed under the devise, by the effect of the republication: *Jackson* v. *Hullock*, 2 Eden, 263.

Republication does not revive a lapsed devise.

On the other hand, [republication by a codicil or otherwise did not, and does not, either under the old or new law, extend a specific gift in the will to objects which that gift was not originally intended to comprehend.] Thus, where a testator devised lands to A. and the heirs of his body, and A. died, leaving issue, in the lifetime of the testator, who subsequently republished his will, the republication did not entitle the heir in tail of A. to the property devised to his ancestor: *Doe* v. *Kett*, 4 T. R. 601. And the result would be the same, it is conceived, though the description of the devisee should be no

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less appropriate to the heir in tail than to the ancestor; for, it is not to be doubted, that, where a testator devises lands to his son John, who dies in the testator's lifetime, and he afterwards has another son of the same name, the republication of the will would be inoperative to carry the property to the second son John: 2 Ves. sen. 626. Nor is the case of *Perkins* v. *Micklethwaite*, 1 P.W. 275, rightly understood, at all contradictory to this hypothesis; for, though in that case a legacy, originally designed for a son of the testator, who died after the execution of the will, was held to belong to a subsequently born son of the same name, by the effect of the codicil, yet the express terms of the codicil appear to have warranted the construction, since it gave to the latter a legacy *over and above what the testator had given him by his will.*

Adeemed legacy not revived by republication.

Agreeably to this view of the subject it has been repeatedly held, that a pecuniary legacy to a child, which has been adeemed or satisfied by a subsequent advancement to the legatee, is not revived by a republication of the will by means of a codicil, such codicil not indicating an intention to revive the legacy: *Izard* v. *Hurst*, 2 Freem. 224; *Monck* v. *Lord Monck*, 1 Ball & Beatty, 298. See also *Drinkwater* v. *Falconer*, 2 Ves. sen. 623; *Crosbie* v. *Macdoual*, 4 Ves. 610. The case of *Holmes* v. *Coghill*, 7 Ves. 499, 12 Ves. 206, seems to afford a further confirmation of the principle here stated. There, the testator having, under his marriage settlement, (subject to an estate for life to himself, and an estate tail limited to his sons in strict settlement), a power to charge 2000*l.* upon certain estates, executed that power by will duly attested. Afterwards, he and his eldest son suffered a common recovery, and limited the lands to uses discharged from the power. By the same instrument they limited to the testator a power by will to charge the 2000*l.* on other lands. Subsequently, he executed a codicil duly attested to his will. It was contended that this codicil, by republishing the will, rendered it a good execution of the new power. But Sir W. Grant, though he admitted the general principle as to republication, held, that this was not a good execution of the power. "It speaks" said he, "only of the power given by the marriage settlement, which was as much gone as if it never had existed. There is no way in which the will can be made to speak of the new power, for a new consideration, affecting different estates."

Whether a republished residuary devise passed what had lapsed.

Though it is quite clear, as we have seen, that republication has no effect in restoring the operation of a lapsed specific, or rather particular devise, yet a different and more difficult question was, whether the lands of which the devise had so lapsed would pass by a residu-

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ary devise in the republished will. This seems to depend on the point, whether, if the particular devisee had been dead when the will was made, the residuary devise would have comprised the lands expressed to be given to the person so deceased; for, if it would not, then the lands, the devise of which *subsequently* lapsed, could not, by the effect of the republication, have passed under the residuary devise, because republication merely made the will speak from its own date, and could not bring within the grasp of a devise in the will any subject which it would not have comprehended, in case the circumstances under which the republication takes place had existed at the original execution of the will. In short, the inquiry is no other than simply this, whether, under wills made before 1838, a residuary devise included particular lands, the devise of which was void ab initio.

Whether a residuary devise passed lands comprised in a void devise.

The only direct authorities on the point which the editor has succeeded in finding, are the following:—In *Doe* v. *Sheffield*, 13 East, 526, the Court of King's Bench treated it as clear, that, where a testator devised certain lands to the sister of A., and the residue of his lands, not thereinbefore disposed of, to B., and it turned out that all the sisters of A. were dead when the will was made, the estate so devised passed by the residuary clause. The facts of the case, however, as eventually ascertained, did not raise the question. In *Williams* v. *Goodtitle*, 10 Barn. & Cress. 895, a testator, by his will, after making certain particular devises, gave all the residue of his estate, not thereinbefore particularly devised, to his wife, E. T., her heirs and assigns for ever. The testator then purchased other real estates, and afterwards made a codicil, attested by three witnesses, whereby, after reciting that he did by his will devise and bequeath all the residue of his real and personal estate he was then possessed of, he ratified and confirmed his will. The testator then, reciting that since the date of his will he had purchased other property, devised the same to his wife for life, and, after her death, *upon trusts that were bad in law*, and he devised the residue specifically to other persons in fee. The question was, whether the widow was entitled, under the residuary devise in the will, to the part ineffectually attempted by the codicil to be devised; and the Court determined that she was. Lord Tenterden, C. J., observed, that the will and codicil were to be considered as one instrument made at the date of the codicil. Then it appears that there is a devise to the wife for life; then certain other devises follow; and lastly, there is a general residuary clause in favour of the wife. His Lordship said, it was admitted, that if all that were in a will, the particular devise and residuary clause might well stand together, and the wife would take under

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the residuary clause. And he thought that the expression at the commencement of the codicil shewed the intention of the testator to have been to ratify his will as to all that he was possessed of at the time of the ratification.

Remarks on *Doe* v. *Sheffield* and *Williams* v. *Goodtitle*.

Although it must be confessed, that, in the cases just stated, the extension of a residuary clause to lands comprised in a specific or particular devise in fee, which was void ab initio, appears rather to have been assumed than discussed; and though, if the matter were res integra, there would certainly be strong ground to contend that a residuary devise, being [under the old law] in its nature specific, ought not to extend to any interest in real estate, which was professed to be otherwise disposed of by the same will; yet, considering how unsteady has been the adherence to this principle, (vide post, s. IX. 3), the probability seems to be, that if the point were now to arise upon a will made before 1838, it would be held, in accordance with the impression of the Judges who decided *Doe* v. *Sheffield* and *Williams* v. *Goodtitle*, that a residuary devise took in all that was not effectually disposed of, *according to circumstances existing at the making of the will;* and the inevitable consequence would be, that, in the case of a particular devise in fee lapsing, followed by the republication of the will, a residuary clause in the republished will would have operated on the lands comprised in the lapsed devise. The point, however, cannot be considered as settled. [It cannot arise under a will made since 1837, because the stat. 7 Will. 4 & 1 Vict. c. 26, s. 25, makes a residuary devise include estates comprised in lapsed and void devises.]

Republication does not revive lapsed residuary devise.

If the residuary devise itself has lapsed, of course the republication of the will was and is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue, as where it embraces the entirety. Thus, if a testator devise the residue of his lands to A., B., and C., as tenants in common in fee, and A. dies, and then the testator makes a codicil to his will, by the effect of which the will is republished, he would, nevertheless, die intestate as to one-third, since the subsisting devise, which originally embraced two-thirds only, could never, by the mere effect of the republication, be expanded into a gift of the entirety.

Republication, how far affected by the recent act.

[The operation of the clause of the new act, which makes the will speak, in regard to the subjects of disposition, from the death of the testator; and that of the provision which extends a general or residuary devise to all the real estate to which the testator may happen to be entitled at his decease, greatly diminish the importance of the doctrine of republication. With respect to the *objects* of gift, however, the recent act leaves the law as it was.]

REPUBLICATION.

Effect of republication of will by codicil or re-execution since 1837.

[Where a will made *before*, is republished by a codicil made *on* or *since* the 1st of January, 1838, or by re-execution, in the manner prescribed by the new law, such republication, unless a contrary intention be indicated, will have the effect of subjecting the will for all purposes to the operation of the new act, and of bringing within its operation all the real estate to which the testator may be entitled at his decease, and making the will speak, in regard to the property comprised in it, from that period; the 34th section having expressly provided that every will re-executed, or republished, or revived by any codicil, shall, for the purposes of the act, be deemed to be made at the time at which the same shall be so re-executed, republished, or revived.]

[In the case of *Upfill* v. *Marshall*, 3 Curt. 636, a will, dated 27th February, 1837, disposing of real and personal estate, was altered by a codicil of 17th June, 1837. On the 10th of July, 1838, the testator republished his will, in the presence of two witnesses, by causing the following memorandum to be written at the end of his will:—"This writing was republished by the said J. Smith, as and for his last will and testament, in the presence of us—(two witnesses):" and he executed this memorandum by going over the signature to the will with a dry pen. After the date of the will and codicil, but before the 10th of July, 1838, the testator purchased certain real estate. It was held that parol evidence was admissible (both with reference to the law of that court and of the Court of Chancery), to shew quo animo the memorandum was made, the ambiguity not being in the language of the instrument, but as to the intention with which the will was republished; and it was held, upon the evidence, that the codicil was not revoked by the republication of the will.]

GIFTS TO CHARITABLE USES.

VIII. Restraints on the testamentary power.

1. *Gifts to Charitable Uses* (*a*).

What are charitable uses.

Lord Hardwicke has defined charity to be a general public use: Amb. 651. In order to ascertain what are charitable purposes,

(*a*) As to superstitious uses, vide stat. 16 Rich. 2, c. 5; 23 Hen. 8, c. 10; 37 Hen. 8, c. 4; 1 Edw. 6, c. 14; 1 Geo. 1, c. 55; and *King* v. *Portington*, 1 Salk. 162; *S. C.*, 1 Eq. Ca. Ab. 96, pl. 6. [See further, as to superstitious uses, 1 Jarm. on Wills, 188—192, who refers to Duke, Char. Uses, 106; 4 Rep. 104; Cro. Jac. 51; 1 Eq. Ca. Ab. 95, pl. 1, et seq.; and Shelf. Ch. Us. 89, where the cases, early and modern, are collected. As to the recent alteration in the law respecting bequests for the promotion of the Roman Catholic religion, see 1 Jarm. on Wills, 190, 191.]

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recourse is usually had to the statute of 43 Eliz. c. 4, which enumerates various kinds of charity; viz. the relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars of universities; repair of bridges, ports, havens, causeways, churches, sea banks, and highways; education and preferment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants, concerning payment of fifteens; setting out of soldiers, and other taxes. Charity is not confined to the objects comprised in this enumeration; it extends to all cases within the spirit and intendment of the statute. Thus, gifts for the erection of water-works for the use of the inhabitants of a town or city, *Jones* v. *Williams*, Amb. 651; for the general improvement of a town or city, *Howse* v. *Chapman*, 4 Ves. 542; for the establishment of a life-boat, *Johnson* v. *Swan*, 3 Madd. 457; or of a botanical garden, *Townley* v. *Bedwell*, 6 Ves. 194; to the trustees and for the benefit of the British Museum, *Trustees of the British Museum* v. *White*, 2 Sim. & Stu. 595; to the poor inhabitants of a parish, *Attorney-General* v. *Clarke*, Amb. 422, (which is held to apply to those not receiving parochial relief, *Bishop of Hereford* v. *Adams*, 7 Ves. 324); to the widows and children of seamen belonging to a port, *Powell* v. *Attorney-General*, 3 Mer. 48; and to the widows and orphans of the parish of A., *Attorney-General* v. *Comber*, 2 Sim. & Stu. 93—have been respectively adjudged to be charitable. [See also *Attorney-General* v. *Earl of Lonsdale*, 1 Sim. 105, in which Sir J. Leach said, "The institution of a school for the sons of gentlemen is not, in popular language, a charity; but in the view of the statute of Elizabeth, all schools for learning are so to be considered."] But the erection of a monument, to perpetuate the memory of the donor, is not a charitable purpose, *Mellick* v. *President of The Asylum*, 1 Jac. 180; nor is the repair of a vault and tomb containing his remains; contrà, it seems, if the vault is to be used for the interment of the donor's family. See *Doe* d. *Thompson* v. *Pitcher* (*a*), 3 Mau. & Selw. 407, 6 Taunt. 359; [*Mitford* v. *Reynolds*, 1 Phill. 185; *Adnam* v. *Cole*, 6 Beav. 353.]

(*a*) In this case the statute had been complied with, and therefore the point did not arise. Perhaps the latter branch of Lord Ellenborough's doctrine is open to exception. A distinction seems to run through the cases between gifts for the benefit of the family of the donor and of strangers. The former are not in general considered to be charitable. [In this case Lord Ellenborough is re-

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Gifts held to be not charitable.

A gift will not be deemed to be charitable merely from the professional character of the devisee, accompanied only by an expression of the testator's expectation that he will discharge the duties incidental to such character. Thus, where the devise was to the Rev. A. A., a dissenting minister, for life, upon condition that he did and should, immediately after the testator's decease, settle and convey the same to trustees, to take place at his (A. A.'s) decease, for the support of the preaching of the Word of God at the meeting-house at L.; and the testator expressed his expectation that the devisee would, after his (testator's) decease, without delay, settle and forward every thing in his power to promote and carry on the Word of God at L., both in his lifetime and after his decease. No attempt was made to support the devise of the remainder after the decease of A. A. (which was clearly void under the enactment presently discussed); but it was contended, that the devise to A. A. for life was void, as charitable, being not in his individual capacity, but in the character of preacher, and in confidence that he would discharge the duties of that station. But the Court held, that it was not charitable, and thought the point too clear for discussion: *Doe* d. *Phillips* v. *Aldridge*, 4 T. R. 264. In this case the devisee was adjudged to be entitled beneficially; and herein it differs from those next stated, in which the gift was held to create a trust, though too indefinite to be executed.

Trusts too indefinite to be pronounced charitable.

Thus, it has been decided that a bequest to the Bishop of D., to dispose of *to such objects of benevolence and liberality* as he should approve, is not charitable, and that the bishop was a trustee for the next of kin: *Morice* v. *Bishop of Durham*, 9 Ves. 408; *S. C.*, 10 Ves. 532.

A similar decision was made, where the gift was to A. and B., and to their executors or administrators, in trust, to be by them applied and disposed of *for and to such benevolent purposes* as they, in their integrity and discretion, might unanimously agree on; the doctrine advanced by the Court being, that if the property might,

ported to have said—"It does appear, I think, to be a charitable use in part, and in part not. As far as concerns the grantor's own instrument it is not, but inasmuch as it is for her family, it may be so considered:" 3 Mau. & Selw. 410. On the other hand, Gibbs, C. J., is reported to have said—"The plaintiff's counsel next insists, that the residue of the land is applicable to a charitable use; because the condition is, that the donee shall keep in repair a vault to receive the body of the donor or any of her family. *We agree with the Court of King's Bench, that this is not a charitable use.*" But there seem to be irreconcileable incongruities between the two judgments, as reported.]

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consistently with the will, be applied to other than directly charitable purposes, the trust was too indefinite for the Court to execute: *James* v. *Allen*, 3 Mer. 17.

So, where an estate was devised to trustees, to be applied by them, and the officiating minister of the congregation or assembly of the people called Methodists, assembling at L., and as they should from time to time think fit to apply the same, Lord Ellenborough and the Court of King's Bench held, that the devise was not charitable, the application being left to the trustees still more indefinitely than it was in the last case but one: *Doe* d. *Toone* v. *Copestake*, 6 East, 328.

Again, where a testator gave the residue of his estate to his executors, upon trust to apply and dispose of the same in or towards such charitable uses or purposes, person or persons, or otherwise, as he might by any codicil, or by memorandum in his own handwriting, appoint, and as the laws of the land would admit of; and in default, upon trust to pay and apply the same in or towards such charitable or public purposes as the laws of the land would admit of; or to any person or persons, and in such shares, manner, and form as his (the testator's) executors, or the survivor of them, or the executors or administrators of such survivor, should in their or his discretion, will, and pleasure, think fit, or as they should think would have been agreeable to him, if living, and as the laws of the land did not prohibit.—Sir J. Leach, V. C., observed, that the testator had not fixed upon any part of the property a trust for a charitable use, and the Court could not, therefore, devote any part of it to charity; he had given it to the trustees expressly upon trust, and they could not, therefore, hold it for their own benefit. The purposes of the trust being so general and undefined, they must fail altogether, and the next of kin become entitled: *Vezey* v. *Jamson*, 1 Sim. & Stu. 69.

[So, where a bequest was for such charitable or other purposes as the trustees should think fit, without being accountable to any person, it was held void for uncertainty: *Ellis* v. *Selby*, 7 Sim. 352.]

"Private charity."

So, where a testatrix declared, as to certain money, that she wished "it to be given to private charity," Sir T. Plumer, M. R., held that the words did not create a trust which could be carried into effect. The charities recognised by the Court were public in their nature, and such as the Court could see to the execution of; but here, the disposition was confined to private charity. Assisting individuals in distress was private charity; but such a purpose could not be executed by the Court or by the Crown: *Ommaney* v. *Butcher*, Turn. & Russ. 260.

Policy of early

The policy of early times strongly favoured gifts, even of land, to

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charitable purposes. Thus, not only was no restraint imposed on such dispositions by the statutes of wills (vide ante, p. 23), but the act of 43 Eliz. c. 4, as that act was construed by the Courts, tended greatly to facilitate gifts of this nature, the statute having been held to authorise testamentary appointments to corporations for charitable uses, *Flood's case*, Hob. 136, and even to enlarge the devising capacity of testators, by rendering valid devises by a tenant in tail; *Attorney-General* v. *Rye*, 2 Vern. 453; *Attorney-General* v. *Burdett*, Id. 755; see also 3 Ch. Rep. 154; and also by a copyholder, without a previous surrender to the use of the will; *Rivett's case*, Moor, 890, pl. 1253, 3 Ch. Rep. 220—as appointments to charitable uses; though it was admitted that the statute did not extend to the removal of personal disabilities, such as infancy, lunacy, and the like. See *Collison's case*, Hob. 136.

times towards dispositions for charity.

To the same policy we may ascribe those rules of construction which obtained a reception, and have retained their hold even until now in the Courts; by the effect of which, property once devoted to charity was never allowed to be diverted into any other channel by the failure or uncertainty of the particular objects. At the commencement of the eighteenth century, however, the current of public opinion appears to have set in an opposite direction, and the Legislature deemed it necessary to impose further restrictions on gifts to charitable objects; from the nature of which, it may be presumed that the practice of devising lands to such purposes had antecedently prevailed to an extent which threatened public inconvenience. It appears to have been considered that this tendency would be sufficiently counteracted by preventing persons from aliening more of their lands than they chose to part with in their own lifetime, the supposition evidently being, that men were in little danger of being injuriously generous at the sacrifice of their own personal enjoyment, and when uninfluenced by the near prospect of death. Accordingly, the stat. of 9 Geo. 2, c. 36, (usually, but rather inaccurately, called the Statute of Mortmain (*a*)), enacts, That no hereditaments, or personal estate to be laid out in the purchase of hereditaments, shall be conveyed or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever or any ways charged or incumbered, in trust, or for the benefit of any charitable uses whatsoever, unless such settlement of hereditaments or personal estate (other than stocks in the public funds) be made by deed

Stat. 9 Geo. 2, c. 36.

No hereditaments or personal estate to be laid out in the purchase of hereditaments, or charged for the benefit of

(*a*) The inaccuracy of this expression has been often remarked. It is convenient, however, because it distinguishes the statute from 43 Eliz. c. 4.

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indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months before the death of the donor, and be enrolled in Chancery within six calendar months after the execution, and unless such stocks be transferred six calendar months before the death of the donor, and unless the same be made to take effect in possession for the charitable use intended, and be without any power of revocation, reservation, trust, &c., for the benefit of the donor or of any persons claiming under him (*a*).

any charitable use,

other than by indenture enrolled in Chancery, &c.

By the 2nd, 3rd, 4th, and 5th sections, the act is declared not to extend to purchases for a valuable consideration (*b*), or to dispositions in trust for the two English universities, or any of the colleges within them, or the colleges of Eton, Winchester, or Westminster, for the maintenance of the scholars upon the foundations, or to the disposition of any estate real or personal lying or being in Scotland.

Exception of purchases, gifts to certain colleges, and property in Scotland.

The statute, it has been decided, extends to property of every description which savours of the realty—as, a grant from the Crown of the right to lay chains in the river Thames for mooring ships, *Negus* v. *Coulter*, Amb. 367; canal shares (*c*), *Howse* v. *Chapman*,

What species of property held to be within the statute.

(*a*) [But a conveyance duly made and enrolled is not void by reason of a reservation to the grantor of a power of regulating the charity: 2 Cox, 301; 1 Mer. 327.]

(*b*) Vide stat. 9 Geo. 4, c. 85.

(*c*) [Mr. Jarman adds, (Treatise on Wills, 199), "and of course stock or railway shares." But, in the recent case of *Hilton* v. *Girand*, 11 Jur. 838, 1 De Gex & Sm. 183, Knight Bruce, V. C., held, that shares in the London Dock Company and the West India Dock Company are not within the statute. His Honor said—"I am of opinion, that stock in the incorporated companies in question, in which the shareholders are interested in the profits to be made, is not to be considered as 'estate, interest, or hereditaments,' within the meaning of the act of King Geo. 2. The charity is, therefore, entitled. It is a most important point for the next of kin. I have no doubt about it; but another branch of the Court may possibly view the point in a different manner." Generally, the acts constituting such companies negative, by express words, the quality of real estate as applicable to the shares; and it is declared by the 7th section of the Companies Clauses Consolidation Act, (8 Vict. c. 16), that "all shares in the undertaking shall be personal estate, and transmissible as such, and shall not be of the nature of real estate." This, however, does not appear to be conclusive by any means. In *The Attorney-General* v. *Giles*, 5 Law J., N. S., Ch., 44, the Master of the Rolls, though he decided that East India Stock is not within the statute, appeared to attach no weight to the argument urged by the counsel on behalf of the charity (Mr. Bickersteth), that East India Stock is declared by act of Parliament to be personal estate. See *S. C.*, infra; and see *Tomlinson* v. *Tomlinson*, 9 Beav. 459. But, in *Sparling* v. *Parker*, 9 Beav. 450, Lord Langdale, M. R., held, that shares in a Gas Light Company and shares in a Dock Company were interests so completely of a personal nature as to be devisable to charity.]

[In the case of *March* v. *Attorney-General*, 5 Beav. 433, Lord Langdale, M. R., held, that policies of assurance by which the directors engage "to pay out of the funds," or "that the funds shall be liable," or "that a share of the

Policies of assurance, shares in London Gas Light and Coke Company, East India Stock, shares in Dock

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4 Ves. 542; money secured on turnpike tolls, *Knapp* v. *Williams*, 4 Ves. 430, n.; or by an assignment of the poor's rates and county-rates, *Finch* v. *Squire*, 10 Ves. 41; leaseholds and mortgages, whether in fee or for years, *Attorney-General* v. *Graves*, Amb. 155; *Attorney-General* v. *Caldwell*, Id. 635; *Attorney-General* v. *Meyrick*, 2 Ves. sen. 44; *Attorney-General* v. *Earl of Winchelsea*, 3 B. C. C. 373; *White* v. *Evans*, 4 Ves. 21; *Currie* v. *Pye*, 17 Ves. 462; [and judgment debts, so far as they operate as a charge on real estate, *Collinson* v. *Pater*, 2 Russ. & Myl. 344.] And, where a testator had bequeathed his personal estate upon trusts for a charity, and afterwards contracted to sell real estate, it was held, that his lien on the property for the purchase-money was "an interest in land" within the meaning of the statute, and accordingly could not pass with the rest of his personal estate: *Harrison* v. *Harrison*, 1 Russ. & Myl. 71. Again, where A., being entitled to certain sums of money which were to be raised by the execution of a trust for sale of real estate, bequeathed all his personal estate to B.; B. bequeathed the residue of her personal estate to charity. It was contended, that, as the period for raising the sums in question had arrived in the life-time of B., (though they were not actually raised until after her decease), it was a breach of duty in the trustees not to raise them, and this neglect ought not to invalidate the gift, especially as the charities had no right to elect to take it as land; but Sir J. Leach, V. C., held, that these sums, constituting an interest in land at the testator's death, could not be legally given to the charities: *Attorney-General* v. *Harley*, 5 Madd. 321.

Legacy partly real and partly personal, void pro tanto.

If the pecuniary gift is partly charged upon land and partly personal, it will be void pro tanto. And therefore, where a testator devised a freehold estate to be sold, and the produce applied, together with so much of the personal estate as should be necessary, to secure an annuity of 30*l.* for the life of A., and, after his death, the

Companies, not within the Statute of Mortmain.

funds shall be paid," are not so connected with land, as, under the Mortmain Act, to render invalid a gift of them to charity, although the assets of the assurance companies consist partly of real estate. The rule is the same, although, by the policy sealed with the corporate seal of the company, the assured becomes a member. In the case of *Thompson* v. *Thompson*, 1 Coll. 381, 8 Jur. 800, Sir J. Knight Bruce, V. C., held, that shares in the London Gas Light and Coke Company are not within the Statute of Mortmain. In *The Attorney-General* v. *Giles*, 5 Law J., N. S., Ch., 44, the Master of the Rolls held, that East India Stock is not within the Statute of Mortmain; and, therefore, that a bequest of East India Stock to a charity is valid. The Master of the Rolls said—"Bank Stock would come much nearer to the terms of the statute than East India Stock, because the holders of Bank Stock are partners, and, as such, are notoriously holders of land."]

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principal to go to a charity; the freehold estate not being sufficient to raise the money, it was held that the bequest was good as to the residue, which was to be raised out of the personal estate: *Waite* v. *Webb*, 6 Madd. 71.

Charitable trust vitiates the legal estate.

Where lands are devised in trust for a charity, the trust is not only itself void, but it infects the legal estate on which it is engrafted: *Adlington* v. *Cann*, 3 Atk. 155; *Doe* d. *Burdett* v. *Wrighte*, 2 Barn. & Ald. 710; see also *Carrick* v. *Errington*, 2 P. W. 361; and therefore, the heir may recover at law, except where there are other trusts not charitable, which of course would entitle the trustees to retain the estate, independently of the vacated trusts, and oblige the heir to prosecute his claim in equity: *Willet* v. *Sandford*, 1 Ves. sen. 186; [*Doe* d. *Chidgey* v. *Harris*, 14 Mee. & W. 517; *Young* v. *Grove*, 16 Law J., N. S., C. P., 216]. See also *Doe* v. *Copestake*, 6 East, 328; *Doe* v. *Pitcher*, 6 Taunt. 359.

Where the conveying of land to a charity is injoined as a condition subsequent, as where the devise is to A., on condition that he shall assign Whiteacre (part of the devised estate) to a charity, the condition alone is void, and the devise is absolute: *Poor* v. *Mial*, 6 Madd. 32.

Bequest of the proceeds of real estate within the statute.

Though the statute contains no express words prohibiting a bequest of money to be produced by the sale of land, yet it is settled by construction, that such a bequest is within the spirit and meaning of the enactment: *Curtis* v. *Hutton*, 14 Ves. 537; *Trustees of the British Museum* v. *White*, 2 Sim. & Stu. 595. The statute, however, expressly extends to the converse case of money being directed to be laid out in land: *Attorney-General* v. *Heartwell*, 2 Eden, 234, and applies not only where the trust expressly directs the investment in land, but where such an application of it is consequential on the nature and purposes of the charity: *Widmore* v. *Woodroffe*, Amb. 636; *Middleton* v. *Clitherow*, 3 Ves. 734.

Recommendation to purchase land held to be mandatory.

Legacy good where trustees have an option to invest in land or other security.

A recommendation to trustees to purchase land is imperative on them, and consequently is no less invalidating in its effect than a trust which is expressly mandatory: *Attorney-General* v. *Davies*, 9 Ves. 546; *Kirkbank* v. *Hudson*, 7 Pri. 212. But if an option is given to the trustees to lay out the money in land, or upon government or personal security, the bequest is not affected by the statute: *Soresby* v. *Hollins*, Amb. 211; *Curtis* v. *Hutton*, 14 Ves. 537 (*a*). If, however, investment in land is the ultimate destination

(*a*) [In *Attorney-General* v. *Mill*, 3 Russ. 328, Lord Eldon said—"If I could collect from any part of the will that it was the testator's meaning that

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of the money, the bequest will not be protected by the circumstance of provision being made for its suspension during an indefinite period; and, therefore, a gift of personal estate, to be laid out in the purchase of lands, has been held to be void, notwithstanding that the trustees are empowered to invest the money in the funds until an eligible purchase can be made: *Grieves* v. *Case*, 4 B. C. C. 67; *S. C.*, Dick. 251; *English* v. *Orde*, Duke, Ch. Uses, 432; *Pritchard* v. *Arbouin*, 3 Russ. 458. These determinations have clearly overruled the case of *Grimmett* v. *Grimmett*, Amb. 210; and it seems somewhat difficult to reconcile with them the more recent case of *Attorney-General* v. *Goddard*, 1 Turn. & Russ. 348, where a testatrix, after bequeathing 1000*l.* Indian annuities, to trustees, for charitable purposes, added, "as money is of more uncertain value than land, I do also give them power to make such purchase as they shall think best for perpetuating the gift;" Sir T. Plumer, M. R., hesitatingly held the bequest to be valid, though he admitted it to be doubtful whether the clause in the will did not amount to a direction to purchase land, and whether the discretion extended to any thing further than the selection of the estate.

So where the purchase of land is not essential to the trust.

It is clear, that where the charitable trust or purpose may be executed without purchasing land, the legacy is good. Thus, where the testator bequeathed 2800*l.* Three per cent. Reduced Annuities, and directed the dividends to be applied "for and towards establishing a school," Lord Thurlow said, that this did not include the purchase or renting of land: the master might teach in his own house, or in the church: *Attorney-General* v. *Williams*, 4 B. C. C. 526. [See also *Attorney-General* v. *Jordan*, Highmore on Mortmain, 225.] So, in another case, the bequest of personalty, "to be a perpetual endowment and maintenance of two schools," was considered by Richards, C. B., to be so far good; though it was rendered void by the addition of a recommendation to purchase land: *Kirkbank* v. *Hudson*, 7 Price, 221. And even where the interest of the bequeathed fund was directed to be applied in providing a proper school-house, Sir J. Leach, V. C., considered, that, as the intention might be executed by hiring a house, without the necessity of purchasing land, the bequest was valid; and that this was not varied by expressions shew-

his trustees should have an option of buying lands and rents of inheritance, either in Scotland or in England, I should give effect to his intention." And, in *Baker* v. *Sutton*, 1 Kee. 224, Lord Langdale did not consider himself at liberty to adopt the refinement suggested at the bar, that the testator meant the mortgage of a ship, or any personal chattel, or contemplated the investment of the money in Ireland or Scotland, or any foreign country.]

ing that the testator contemplated the continuance of the charity for ever: *Johnson* v. *Swan*, 3 Madd. 457 (*a*).

Legacy to be applied in erecting school-house, bad.

It has been much questioned whether a bequest of money, to be applied in the erection of a school-house, or other building for charitable purposes, is bad, as involving a trust to purchase. Lord Hardwicke thought, that if the trustees could get a piece of ground given to them, so that land need not be purchased, the gift was good: *Vaughan* v. *Farrer*, 2 Ves. sen. 182; *Attorney-General* v. *Bowles*, Id. 547. The contrary, however, is now settled by a series of decisions: *Foy* v. *Foy*, 1 Cox, 163; *Attorney-General* v. *Nash*, 3 B. C. C. 588; *Attorney-General* v. *Whitchurch*, 3 Ves. 144; *Chapman* v. *Brown*, 6 Id. 604; *Attorney-General* v. *Parsons*, 8 Id. 186; *Attorney-General* v. *Davies*, 9 Ves. 535; *Pritchard* v. *Arbouin*, 3 Russ. 458.

Improvement of land already in mortmain allowed.

But the bequest of a sum of money, to be applied in the erection of buildings on land which is already devoted to charitable purposes, (*Glubb* v. *Attorney-General*, Amb. 373; *Brodie* v. *Duke of Chandos*, 1 B. C. C. 144, n.; *Attorney-General* v. *Bishop of Oxford*, Ib.; *Attorney-General* v. *Parsons*, 8 Ves. 186; *Attorney-General* v. *Munby*, 1 Mer. 327,) or in the repair and improvement of buildings devoted to charity, (*Harris* v. *Barnes*, Amb. 651; *Attorney-General* v. *Chester*, 1 Bro. C. C. 444,) is unquestionably good, as by such gifts no additional land is thrown into mortmain (*b*).

Legacy to be applied in discharging an incumbrance on charity property invalid.

A legacy to be applied in the liquidation of a subsisting incumbrance on land which is already subject to charitable uses, appears to have been considered as not falling within the principle applicable to trusts for the amelioration and improvement of charity property, but as appropriating to charity a new interest in land. Thus, it has been held, that a bequest of a sum of money to be applied in paying off a mortgage debt on a meeting-house cannot be supported; *Corbyn* v. *French*, 4 Ves. 418; and the circumstance that the incumbrance on the chapel is equitable only is immaterial: *Waterhouse* v. *Holmes*, 1 Sim. 162.

Bequest on condition of another providing land, void.

In the case of *Attorney-General* v. *Davies*, 9 Ves. 543, Sir William Grant intimated a strong opinion that money could not be given to be laid out in building, on condition of another person providing the land, observing that it was an absurd distinction that a testator

(*a*) [In *Devonport* v. *Mortimer*, 3 Jur. 287, which, however, was not a case of a will, where the trust was for the purchase *in rental* of a building, the Vice-Chancellor held the gift not void under the Mortmain Act.]

(*b*) As to the evidence required in these cases, that the land on which the expenditure is to be made has been effectually devoted to charity, vide *Ingleby* v. *Dobson*, 4 Russ. 342.

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shall not give land to a charity, but may give money in consideration of another's giving land. [In this case Lord Eldon, on affirming Sir W. Grant's decree, observed: "it is now clearly established, that, unless the testator *distinctly points to some land already in mortmain*, the gift is not good:" *Attorney-General* v. *Davies*, 9 Ves. 544. See also to the same effect, *Gibblett* v. *Hobson*, 5 Sim. 651; affirmed by Lord Brougham, 3 Myl. & K. 517, where his Lordship held, that matter dehors the will might be looked at for the purpose of placing the Court in the situation of the testator. And see *Pritchard* v. *Arbouin*, 3 Russ. 456; *Mather* v. *Scott*, 2 Kee. 172.] However, where a bequest for the erection of a school-house is so framed as not to authorise the application of the money to the purchase of lands, and not to wait until, or be conditional upon, the event of land being provided by others, (though the testator expresses his expectation that lands will be so provided), it is indisputably valid: *Henshaw* v. *Atkinson*, 3 Madd. 306. [In this case the testator expressly directed that no part of the money bequeathed should be applied to the purchase of land, and shewed that he meant the gift to take effect independently of the acquisition of land; and the bequest was held not to be invalidated by the expression of the testator's expectation that land would be purchased by other persons. In the same case, Sir John Leach, V.C., observed: "The disputed doctrine of Lord Northington in *Attorney-General* v. *Tyndall*, 2 Eden, 207, has been much adverted to, but it has no application to this case. That doctrine has not received the sanction of subsequent authorities; and the principle, if pushed to its extent, would prohibit all repair or improvement of existing buildings." This, however, is not quite a fair statement of Lord Northington's argument, which was this: "because building on a site is laying out the money in realty, and, therefore, contrary to the spirit of the statute: it improves the site, is demandable in a præcipe, and is a purchase of so much realty * * * If these precedents were to prevail, we should see almshouses turned into palaces, and small spots of ground covered with immense buildings:" 2 Eden, 212, 213.]

Gift not invalidated by testator's expression of hope that land would be purchased by others.

Where a legacy, which standing alone would be valid, is founded upon and derives its purpose and object from an illegal devise, it is necessarily involved in the failure of such devise. Thus, if a testator, after devising certain messuages to be converted into alms-houses, bequeaths the interest of a sum of money to the occupiers of such houses—as the devise is clearly void, the legacy is equally so: *Attorney-General* v. *Goulding*, 2 B. C. C. 428; *Attorney-General* v.

Legacy founded on an illegal devise void.

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Whitchurch, 3 Ves. 141; *Limbrey* v. *Gurr*, 6 Madd. 151; *Price* v. *Hathaway*, Id. 304. Or if a testator devises a messuage to be used as a school-house for the education of poor children, and bequeaths a fund to trustees, with a direction to apply the income in keeping the school-house in repair and providing a master, the statute, by invalidating the devise of the house, deprives the pecuniary legacy of its object, which consequently fails: *Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 270 (*a*); and in some other instance presenting not quite so simple and obvious an application of the principle, a bequest, valid in itself, has been held to fail from the impracticability of the general scheme, of which it forms a part: *Grieves* v. *Case*, 2 Cox, 301; 4 B. C. C. 67.

Bequest founded on an impossible condition, void.

[Somewhat analogous to the last-mentioned class of cases appears to be that of a bequest which fails from an impossible condition being annexed to it—a condition which, though not illegal, turns out to be impossible in point of fact; in other words, which fails, not on account of any matter of law, but on account of a matter of fact. As where, in the recent case of *Mitford* v. *Reynolds*, 12 Jur. 197, a testator directed a specific piece of land to be purchased, as a place of interment for himself, his parents, and sister, and gave the residue of his property, after deducting what would be requisite to defray the keep of his horses, to the government of Bengal for a charity. The owner of the specified piece of land refused to sell it on any terms for the purposes in the will mentioned. The Vice-Chancellor of England held, that, as the bequest totally failed by reason that it was impossible in point of fact, it must be considered as if it never was made at all; consequently, that that portion of the personal estate which might have been given by the eighth clause of the will totally failing, necessarily fell into that (the residue) which was the subject of description in the ninth clause.]

Effect where the proportion applicable to a valid purpose can only be ascertained through an illegal devise.

So, where the proportion of a fund, which is made applicable to a proper object, depends on the previous appropriation of an adequate portion thereof to a purpose which the Statute of Mortmain forbids, the necessary effect of the illegality of the one is to defeat the other. Thus, if a testator bequeaths a sum of 5000*l*., part to be applied in erecting alms-houses, and the residue to St. Thomas's Hospital, the failure of the first object is fatal to the second, the erection of the

(*a*) In cases the converse of this, namely, where the valid gift is the primary one, and the invalid gift is ancillary and subordinate to it, the former, of course, is not affected by the illegality of the latter: *Blandford* v. *Fackerell*, 4 B. C. C. 394.

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alms-houses, which is not permitted, being necessary to ascertain the proportion intended for the hospital: *Attorney-General* v. *Davies*, 9 Ves. 535; *Limbrey* v. *Gurr*, 6 Madd. 151; *Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 270.

Equity will not execute a trust which is within the statute.

It is to be observed, that if a legacy, which is directed to be laid out in land, is actually paid, (the party paying it not availing himself of the statute), and the trustee lays it out accordingly, the Court will not execute the trust: *Attorney-General* v. *Ackland*, 1 Russ. & M. 243 (*a*).

The preceding decisions shew that ever since the passing of the statute of 9 Geo. 2, the Courts of law have warmly and zealously seconded the design of the Legislature, and this is still more strikingly displayed by some doctrines not yet adverted to. One of these is, that the statute cannot be evaded by a secret trust, so that the heir can compel a devisee to disclose any promise which he may have made to the testator to devote the land to charity: *Boson* v. *Statham*, 1 Eden, 508; *Muckleston* v. *Brown*, 6 Ves. 52; *Martin* v. *Hatton*, cit. Id. 61; *Stickland* v. *Aldridge*, 9 Ves. 516; *Paine* v. *Hall*, 18 Ves. 475. And such promise, if denied by the devisee, may be proved by evidence aliunde: *Edwards* v. *Pike*, 1 Cox, 17; *S. C.*, 1 Eden, 267. The trust, by whatever means established, will vacate the devise, and let in the title of the heir. This doctrine evidently proceeds on the assumption that the trust, if legal, would have been binding on the conscience of, and might have been enforced against, the devisee; and if this ground fails, the rule does not apply.

Secret trust for charity affecting the conscience of the devisee.

Distinction where trust is declared by an unattested paper.

As where a testator, after devising lands by a will duly attested, declares a trust in favour of charity by an unattested paper, the Statute of Frauds, as it would afford to the devisee a valid defence against any claim on the part of the charity, will, of course, equally defend him against any claim on the part of the heir, on the ground of the charitable trust: *Adlington* v. *Cann*, 3 Atk. 141; 9 Ves. 519. Of course, the case would have been different if the devisee had prevailed on the testator to give him the estate absolutely, under the assurance that the unattested paper was a sufficient declaration of the trust for a charity. See *Adlington* v. *Cann*, 3 Atk. 152.

Assets not marshalled in favour of charity.

Another important and well-established rule is, that assets will not be marshalled in favour of a charity, or, in other words, that where a mixed fund, consisting partly of what may be legally given

(*a*) [On refunding sums erroneously paid, a legatee, who has no further property in the estate, is not liable to interest; secus, if the legatee is entitled to another fund making interest in the hands of the Court: *Gittins* v. *Steele*, 1 Swanst. 199.]

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to charity, and partly of what cannot be so given, as for instance, a bond debt and a mortgage debt, are bequeathed for purposes, some charitable and some not charitable, the Court will not apply the part which cannot be given to charity exclusively to the other purposes, in order to render the charitable gift operative upon the remainder; but will hold the bequest of the mortgage to be void pro tanto, i. e. in respect of so much as would, upon a rateable distribution of the entire fund, have been applied to charitable purposes: *Attorney-General* v. *Tyndall*, 2 Eden, 207; *Middleton* v. *Spicer*, 1 B. C. C. 201; *Attorney-General* v. *Earl of Winchelsea*, 3 B. C. C. 373; *Makeham* v. *Hooper*, 4 Id. 153. So, where a general residue, consisting partly of what cannot be legally devoted to charity, as leaseholds or mortgages, is bequeathed to a charity after payment of debts or legacies, these charges will not be thrown exclusively on the leaseholds and mortgages, in order to leave the remainder of the personal estate for the residuary bequest to operate upon, but the debts or legacies will be paid pro ratâ out of the entire property, and the unapplied portion of the leaseholds and mortgages will go to the next of kin, and the unapplied portion of the rest to the charity: *Attorney-General* v. *Earl of Winchelsea*, 3 B. C. C. 373; *Howse* v. *Chapman*, 4 Ves. 542; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 373; *Curtis* v. *Hutton*, Id. 540; *Currie* v. *Pye*, 17 Ves. 464. [See also *Mogg* v. *Hodges*, 2 Ves. sen. 52; *Crosbie* v. *Mayor of Liverpool*, 1 Russ. & Myl. 761, n.; *Hobson* v. *Blackburn*, 1 Kee. 273. In the case of *Williams* v. *Kershaw*, 1 Kee. 274, n., before Lord Cottenham, when Master of the Rolls, there were particular charitable legacies, and a gift of the residue for such benevolent, charitable, and religious purposes as the testator's trustees should in their discretion think fit; (which gift, it appears from a note of the case in 5 Cl. & Fin. 111, was held void;) and it was contended, that the particular charitable legacies ought to be made good out of so much of the residue as consisted of pure personalty. Lord Cottenham's observation, as to this point, was as follows:—"This would be marshalling the assets at least against the next of kin, and would be contrary to the rule of the Court adopted in all such cases, which is to appropriate the fund as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail as would in that way be to be paid out of the prohibited fund." In the subsequent case of *Cherry* v. *Mott*, 1 Myl. & Cr. 123, where a testator, reciting his intention, if he recovered his health, of contracting with the Governors of Christ's Hospital for the purchase of a presentation of a boy to that charity, desired that

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if the money arising from his residuary personal estate should be sufficient for the purpose, the contract should be made, the Master of the Rolls (Lord Cottenham) said, "This legacy is conditional. There is no gift if the personal estate be not sufficient to fulfil the contract; and it appears that such is the case, the governors declining the sum offered on the ground of its inadequacy. Indeed, from the rules applicable to charity legacies, such must be the case. Part of the testator's property consists of personalty of such a nature, or in such a state of investment, as cannot be applied to purposes of charity. There being no marshalling in favour of a charity legacy, the general personal estate, mixed and pure, must in the first place be considered as apportioned for the purpose of paying the several legacies. If, therefore, the price at which the governors would be willing to contract could be ascertained, that price so apportioned would be contributed partly by the personal estate applicable to the payment of charity legacies, and partly by the personal estate which is not so applicable; and as the former only could be taken, the sum applicable must of necessity fall short of the amount required to perform the contract, so that the event never can arise, upon the happening of which the legacy is to depend. There never can be money arising from the personal estate sufficient to make the contract. If this view be correct, the legacy must fail, for there may no doubt be a conditional legacy to a charity as well as for any other purpose."]

[Mr. Jarman, in his Treatise on Wills, Vol. 1, p. 210, observes, "According to the principles of the authorities, then, it should seem that every charitable legacy bequeathed by any testator whose will does not contain the usual clause directing such legacies to be paid exclusively out of the personalty, and the general residue of whose property consists partly of leaseholds or real securities, is void pro tanto,—a doctrine which, it is believed, is not generally known to or acted upon by executors." However, in the case of *The Philanthropic Society* v. *Kemp*, 4 Beav. 581, where a testatrix directed her charity legacies to be paid "out of her ready money, and the proceeds of the sale of her funded property, personal chattels and effects, and not from the proceeds or by sale of her leasehold or real estates;" and charged her leasehold estates "in addition to," and not "in exoneration of" her other personal estate, with the payment of her debts, funeral and testamentary expenses, and legacies not given to charities, Lord Langdale, M. R., held that the charity legacies failed in the proportion of the mixed to the pure personalty. And in the more recent case of *Sturge* v. *Dimsdale*, 6 Beav. 462,

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where a testatrix created a mixed fund of realty and personalty for payment of her debts and legacies, but directed the charity legacies to be paid out of pure personalty, and afterwards directed her trustees to set apart a sum of stock sufficient to provide for a number of annuities; and, as the annuitants died, the stock let loose to be applied in payment of the charity legacies, Lord Langdale, M. R., held that the second gift created a demonstrative fund of pure personalty, out of which the charity legacies were to be paid; but his Lordship expressed a doubt whether the words directing the charity legacies to be paid "exclusively out of and from such part of her personal estate only as might be legally applicable thereto," would be sufficient to exempt any part of the estate from the ordinary rules of applying and distributing assets, the words not containing any direction that the charities should, in the distribution of the assets, have any priority over any other demands upon the general assets.]

Custom of London.

It has been thought that the statute does not affect the custom of London, by virtue of which resident freemen were enabled to devise their lands in mortmain; but the point is doubtful, as the act makes no saving of local customs. At all events, it is clear that the custom applies only to lands in London: *Middleton* v. *Cater*, 4 B. C. C. 409.

Exception in favour of the English Universities, and Eton, Winchester, and Westminster.

The exception in the act relating to gifts to the English Universities and their colleges, and the three colleges of Eton, Winchester, and Westminster, requires to be noticed. Many instances of such devises occur in the reported cases of *Emanuel College* v. *Bishop of Norwich*, 4 B. C. C. 482; *Attorney-General* v. *Andrew*, 3 Ves. 641; *Attorney-General* v. *Bowyer*, Id. 725. It has never been decided whether the proviso extends to colleges founded since the act, as Downing College, Cambridge. In the case of *Attorney-General* v. *Tancred*, 1 Eden, 16, Lord Northington threw out an opinion that it was confined to colleges antecedently established; but Lord Loughborough appears to have dissented from this opinion. See *Attorney-General* v. *Bowyer*, 3 Ves. 728. It is clear, that the statute renders valid the devise, as well of the legal estate as of the equitable interest: *Benet College* v. *Bishop of London*, 2 W. Blackst. 1182: but, of course, it does not authorise devises of lands to colleges in trust for other charitable objects; *Attorney-General* v. *Tancred*, 1 Eden, 15; *S. C.*, 2 W. Blackst. 90 (*a*); *Attorney-General* v. *Munby*, 1 Mer. 327; but it seems not to be essential that the trust should embrace

(*a*) In this case the devise to the college embraced other charitable objects; but the Court, nevertheless, held, that the college took the whole beneficially. See also *Blandford* v. *Fackerell*, 4 B. C. C. 394.

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the whole college. A trust for the benefit of particular members would be within the proviso; and therefore, a devise to the Master and Fellows of Christ's College, in trust that they and their successors should apply the rents for some undergraduate student, has been held to be good: *Attorney-General* v. *Tancred*, 1 Eden, 10. But the devise must be for collegiate or academical purposes; and a gift to the college, for the benefit of an individual member (the senior fellow for the time being) who was to live in the house, and entertain the poor, and distribute medicine and books among them, was held to be void on this principle: *Attorney-General* v. *Whorwood*, 1 Ves. sen. 534. The restriction imposed by the statute of 9 Geo. 2, on the number of advowsons to be held by the colleges in the Universities, is repealed by the stat. 45 Geo. 3, c. 101. It appears to have been the opinion of Lord Loughborough, in the case of *Attorney-General* v. *Andrew*, 3 Ves. 633, that if a devise of real estate to a college was refused by the college, it might, as the lands were originally devised to a valid purpose, be executed cy pres.

Exception in favour of Scotland.

The exception made by the act in favour of property in Scotland has been held to point at the locality of lands only, precluding, therefore, the devise of lands in England to a Scotch charity, but admitting of English personalty being bequeathed to be laid out in lands in Scotland, so far as is consistent with the Scotch law, which permits the destination of real estate to *some* kinds of charity: *Oliphant* v. *Hendrie*, 1 B. C. C. 571; *Curtis* v. *Hutton*, 14 Ves. 536; *Mackintosh* v. *Townsend*, 16 Ves. 330; *Attorney-General* v. *Stewart*, 2 Mer. 143; *Attorney-General* v. *Mill*, 3 Russ. 328. It has been held, that the circumstances, that the charity is Scotch and that trustees to be chosen for administering it are to be Scotchmen, do not conclusively shew that the purchase is to be of lands in Scotland, so as to take the bequest out of the statute: *Attorney-General* v. *Mill*, 3 Russ. 328 (*a*).

Attorney-General v. *Mill.*

(*a*) [This case of *Attorney-General* v. *Mill*, 3 Russ. 328, is an example of the disinclination of the English Courts to take such bequests out of the statute, as it has been already cited as an example of the effect of the conflict of laws, (ante, p. 19). In this case, a Scotchman, by a will in the English form, made in England, gave the residue of his personal estate to trustees to lay out in the purchase of lands or "rents of inheritance;" and he directed the trustees of his will to pay the rents annually to certain other trustees, who were at all times to be persons residing within twenty miles of M., to be by them applied to the relief of indigent ladies in M., or within twenty miles of that town. It was contended by Sir Charles Wetherell and Mr. Sugden, in support of the bequest, that the testator was a Scotchman; that two of the trustees named in the will, and the trustee appointed by the codicil, resided in Scotland; that the objects of the charity were exclusively Scotch;

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Purchase of lands in Ireland.

So, of course, a bequest of money to be laid out in lands in Ireland, for charitable purposes, will be good, (see *Campbell* v. *Earl of Radnor*, 1 B. C. C. 272), no act corresponding with the English Mortmain Act having been passed by the Irish Legislature before the Union, or by the Parliament of the United Kingdom since: *Attorney-General* v. *Power*, 1 Ball & Beatty, 154 (*a*). The statute has also been decided not to apply to the British colonies: *Attorney-General* v. *Stewart*, 2 Mer. 141. "Framed as the Mortmain Act is," said Sir William Grant, in his very able judgment in this case, "I think it is quite inapplicable to Grenada, or to any other colony. In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly English, calculated for the purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred, as it stands, into the code of any other country."

Statutes allowing land to be devoted to particular charities.

The Legislature has, in several instances, abandoned the policy which dictated the statute under consideration in favour of particular objects. Thus, by the land-tax redemption act, (42 Geo. 3, c. 116, s. 50), money may, by will or otherwise, be given to be applied in the redemption of the land-tax on hereditaments settled to charitable uses. So, the stat. 43 Geo. 3, c. 107, authorises the devise of lands to the Governors of Queen Anne's Bounty; and again, the stat. 43 Geo. 3, c. 108, empowers persons, by will executed three months before death, to devise lands not exceeding five acres, or goods and chattels not exceeding in value 500*l.*, for

and that the most anxious care had been taken, that the administration of the charity should be conducted solely by persons residing in Scotland. Under these circumstances, the probability is, that the testator meant, that the lands or rents of inheritance should be purchased in Scotland, at least he must have intended that the trustees should have an option of making the purchases there. This inference is corroborated by the use of the phrase "rents of inheritance," which is more applicable to property in Scotland than in England; for fee-farm rents are the only species of *English* hereditaments which would answer that description, and the amount of the fund was far too considerable for such a species of investment. Notwithstanding all this, Lord Eldon persisted in "not seeing enough to induce him to suppose, that the testator contemplated the purchase of lands in Scotland, or even that his trustees should have an option of buying lands and rents of inheritance either in Scotland or in England;" and, consequently, held, that the bequest was void under the Mortmain Act. The judgment of Lord Eldon was affirmed in the House of Lords: 5 Bligh, N. S., 593.]

(*a*) [In the recent case of *The Incorporated Society* v. *Richards*, 1 Dru. & War. 258; 1 Conn. & Law. 58, Lord Chancellor Sugden held, that Courts of Equity in Ireland have an inherent jurisdiction in cases of charity; and that a devise to a corporation for its own purposes, though void at law, is good in equity.]

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erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy of the Church of England is used, or any manor-house for the residence of the minister, or any out-buildings, offices, churchyard, or glebe, for the same respectively; but no glebe, containing upwards of fifty acres, is to be augmented above one acre. The Statute of Mortmain has also been repealed, pro tanto, in favour of the British Museum, (see stat. 5 Geo. 4, c. 39), and probably of some other public institutions. See stat. 19 Geo. 3, c. 23, authorising gifts of land to the Bath Infirmary: *Makeham* v. *Hooper*, 4 B. C. C. 153. [For a list of some of these public institutions in favour of which the Statute of Mortmain has been dispensed with, see Shelford on Charitable Uses, ch. 1, s. 4, pp. 42 et seq.]

As to bequests of personalty.

The statute of 9 Geo 2, leaves the disposition of personal estate, other than chattel interests in land, quite unrestrained, except where directed to be laid out in land; so that, with this qualification, a man may, by his will, bequeath his whole personal estate to charitable purposes, in despite of the claims of his nearest kindred; and, by a rule of construction peculiar to charitable gifts, if the donor declares his intention in favour of charity in general, without any specification of objects; or even if he refers to a past or future specification which he never has made, or does not afterwards make; or if the gift is to a charity which has ceased to exist, or is illegal (being for the propagation of doctrines of religion which the law does not sanction, 7 Ves. 409), or which refuses to accept the proffered bounty; though by this means the particular object is become impracticable or unascertainable; yet the main and substantial purpose being charity, that purpose will not be defeated by the failure of the particular object, but the trust will be executed cy pres, i. e. the Court of Chancery, or the Crown, by *sign manual* (*a*), will direct its application to some existing purpose consistent, so far as may be, with the spirit of the testator's design: *Anon.* Freem. Ch. Cas. 262; *Baylis* v. *At-*

Cy pres doctrine applied to charitable gifts.

Where the Crown and where the Court administer charity.

(*a*) Where the bequest is *to trustees* for charitable purposes, the administration devolves upon the Court, and a scheme is ordered to be laid before the Master for the application of the fund; but where no trustee is interposed, [or objects selected, 7 Ves. 83], the *sign manual* of the King, as parens patriæ, is required: *Paice* v. *Archbishop of Canterbury*, 14 Ves. 372. [Where a testator gave a legacy to a voluntary charitable society which existed at his death, but was dissolved before his assets could be administered, and the question was, whether the legacy was to be applied to a charitable purpose by the Crown under the sign manual, or was to be administered by the Court cy pres, it was held, that it devolved upon the Court to execute his intention cy pres: *Hayter* v. *Trego*, 5 Russ. 113. See also *Reeve* v. *Attorney-General*, 3 Hare, 191.]

torney-General, 2 Atk. 249; *De Costa* v. *De Pas*, Amb. 228, cit. 7 Ves. 76; *Attorney-General* v. *Herrick*, Amb. 712; *White* v. *White*, 1 B. C. C. 12; *Attorney-General* v. *City of London*, 3 B. C. C. 176; *Moggridge* v. *Thackwell*, 1b.; *S. C.*, 1 Ves. jun. 464, 7 Ves. 36; *Attorney-General* v. *Andrew*, 3 Ves. 633; *Bishop of Hereford* v. *Adam*, 7 Ves. 324; *Cary* v. *Abbott*, Id. 490; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 374; *Mills* v. *Farmer*, 1 Mer. 55; *Legge* v. *Asgill*, Turn. & Russ. 265, n. (*a*). [For some additional cases, see 1 Jarm. Treat. on Wills, 217; and see the following more recent cases:—*Bristow* v. *Bristow*, 5 Beav. 289; *Martin* v. *Maugham*, 8 Jur. 609—V. C. E.; *Townsend* v. *Carus*, 3 Hare, 257, 8 Jur. 104; *Attorney-General* v. *Corporation of Shrewsbury*, 6 Beav. 220; *Ironmongers' Company* v. *Attorney-General*, 10 Cl. & Fin. 908; *Thompson* v. *Thompson*, 1 Coll. 392, 395, 8 Jur. 839; *Attorney-General* v. *Gladstone*, 13 Sim. 7; *Attorney-General* v. *Glasgow College*, 10 Jur. 676—V. C. K. B. In *Nightingale* v. *Goulburn*, 12 Jur. 317, where a testator bequeathed the residue of his property (personalty) to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of his beloved country, Great Britain, it was held by Lord Cottenham, affirming the decision of Vice-Chancellor Wigram, that this was a valid bequest.] In some instances, however, the testator's intention has been considered to be so distinctly marked in favour of a specific object, as not to warrant the extension of the gift to any other; [*Attorney-General* v. *Whiteley*, 11 Ves. 241;] *Attorney-General* v. *Bishop of Oxford*, 1 B. C. C. 444, n.; and in other cases the trust created by the testator has been conceived in terms so vague and ambiguous, not merely as to the nature of the charitable purposes, but as to the fact of charity being the object at all, that it has been held to be void, and the beneficial property devolved to the next of kin. See cases stated ante, p. 138, 139. [In the case of *Kendall* v. *Granger*, 5 Beav. 300, Lord Langdale, M. R., held a bequest of personalty to trustees to be "applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," to be void as a charitable bequest, on the following ground:—"The Court has adopted a very narrow construction in deciding what is to be deemed a charitable purpose. It must be either one of those purposes denominated charitable in the statute of Elizabeth, or one of such purposes as the Court con-

(*a*) These cases seem to have overruled the case of *Brown* v. *Heale*, 7 Ves. 50, n., the authority of which was also expressly denied by Lord Eldon in *Morice* v. *Bishop of Durham*, 10 Ves. 539.

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strues to be charitable, by analogy to those mentioned in that statute. In this case the direction is to apply this fund 'for the relief of domestic distress, assisting indigent but deserving individuals.' I confess, in my view, that if the sentence had ended here, I should have said that this was a good charitable purpose; for its object is to relieve distress, by assisting indigent but deserving individuals; and that would be a valid charitable purpose, because of the word 'indigent;' but the testator goes on to say, 'or encouraging undertakings of general utility, in such mode and proportions as their own discretion may suggest, irresponsible to any person or persons whomsoever.' Now a charitable purpose may very well, I conceive, be a purpose of general utility; but the question which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this Court deems to be charitable? I own that, in my opinion, according to the decisions which have taken place in this Court, they are not." See also *Thompson* v. *Thompson*, 1 Coll. 399.]

Where the Court will pay legacies to a charity without a scheme.

Where a pecuniary legacy is absolutely bequeathed to a corporation constituted for charitable purposes, the Court will direct payment without requiring that a scheme be settled by the Master for its appropriation: *Society for the Propagation of the Gospel in Foreign Parts* v. *Attorney-General*, 3 Russ. 142. And the same rule obtains where a legacy is given to the treasurer or other officer of a charitable institution, though not a corporation, to become part of the general funds of that institution. See *Wellbeloved* v. *Jones*, 1 S. & S. 43. But where the legacy is to be applied, not as part of the general funds of the institution, but for certain permanent charitable trusts which the testator has pointed out, the Court will take upon itself to insure the accomplishment of the testator's object by referring it to the Master to settle a scheme: Ibid.

Cy pres doctrine not applied to cases within the stat. 9 Geo. 2, c. 36.

The doctrine of cy pres ought not to be dismissed without pointing the attention of the reader to the strenuous and undeviating refusal of the Courts to apply the doctrine to bequests which are vacated by the statute of 9 Geo. 2, c. 36. Not only is a bequest of money to be laid out in land not executed cy pres, (as a bequest which is illegal on some other grounds would be executed, *Cary* v. *Abbott*, 7 Ves. 490); but it has even been held that an express clause, importing that, in case the charity could not by law take effect in the manner expressed, the trustees were to dispose of the property to such charitable uses as should be as near to the intention before expressed as might be, and the laws of the land would permit, did not authorise the Court to apply it to a valid charitable

purpose: *Attorney-General* v. *Tyndall*, 2 Eden, 207. (Observe also the exclusion of the cy-pres doctrine in the case of *Attorney-General* v. *Hinxman*, 2 Jac. & Walk. 270, and other cases cit. ante, pp. 147, 148).

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2. *Rule against Perpetuities.*

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Rule against perpetuities, what.

The rule against perpetuities is that rule of public policy which prohibits the suspending of the absolute ownership in real or personal estate beyond a certain period. The new modifications of estate consequential on the introduction of uses first drew attention to the necessity of imposing some restraint of this nature, though they did not wholly create that necessity; for if uses had never existed, some restriction would have been necessary on executory and future interests in personal estate, analogous to that rule of the common law concerning remainders, which precluded (and still precludes) the limitation of lands to an unborn person for life, with remainder to his issue: *Somerville* v. *Lethbridge*, 6 T. R. 213; *Beard* v. *Westcott*, 5 Taunt. 393; *Hayes* v. *Hayes*, 4 Russ. 311; or, as it was clumsily expressed, the limiting of a possibility upon a possibility. For some time the Judges had no very distinct notions of the restrictions to be placed on springing uses and executory devises (*a*), of whose evil tendency, as promotive of perpetuities, they one and all expressed the utmost apprehension. A life in being was first reluctantly conceded, *Duke of Norfolk's case*, 3 Ch. Cas. 1; but was soon perceived to involve the allowance of any number of co-existing lives, whose utmost measure of duration is only that of the life of the survivor: *Thellusson* v. *Woodford*, 4 Ves. 227, 11 Ves. 112, 1 New Rep. 357. It was then held, that a life or lives in being and *a little more* was allowable. Thus, where a testator devised to his wife for life; remainder to C., his second son, in fee; provided that if D., his third son, should, *within three months*

Gradual establishment of the present rule.

A life and three months allowed.

(*a*) In the discussion in the text, it has been assumed that the reader is acquainted with the distinction between contingent remainders and executory devises, rendered familiar to every one by the admirable treatise of Mr. Fearne. The result of the elaborate definition of a remainder, contained in that work, is, that it is a limitation expectant on the expiration of a particular estate of freehold created by the same instrument. An executory devise is a devise of a future estate or interest, which cannot take effect as a remainder; or, in other words, of a future interest which is not to arise on the expiration of a precedent particular estate of freehold created by the same will. If there is no preceding estate of freehold, or if the future interest takes effect in derogation of such estate, or an interval *necessarily* occurs between the expiration of the one and the taking effect of the other, the future estate is executory.

Distinction between a remainder and an executory devise.

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after his (testator's) wife's decease, pay 500*l.* to C., his executors, &c., then he devised the same lands to D. and his heirs: this was held to be a good executory devise to D.: *Marks* v. *Marks*, 1 Stra. 179; *S. C.*, 10 Mod. 420, Fea. C. R. 432.

A life and one year.

So, where lands were limited by marriage settlement to the use of A. and his wife for their lives, remainder to trustees and their heirs during the lives of A. and his wife, to preserve contingent remainders; remainder to the first and other sons of the marriage successively in tail male; remainder to the right heirs of A., with a proviso that if the heirs of the wife should, *within one year after the death of the survivor of the husband and wife*, pay 4000*l.* to the heirs or assigns of the husband, then the fee should remain to the use of the heirs of the wife: the House of Lords held the executory limitation to the heirs of the wife to be good: *Lloyd* v. *Carew*, Pre. Ch. 72, Show. P. C. 137, Fea. C. R. 432.

It was next decided that an executory limitation to the unborn child of a living individual (and who must necessarily come in esse during a life in being and the period of gestation (*a*)), to take effect at his or her majority, reaching, therefore, possibly to a period of a life and twenty-one years, and nine or ten months afterwards, was valid. This point was recognised in the case of *Stephens* v. *Stephens*, Cas. temp. Talbot, 228, where A. devised lands to W. and his heirs; and if W. should die before the age of twenty-one, then to T., his heirs and assigns; but in case T. should die before twenty-one, then to such other son of M. (who was the mother of the prior devisees), *as should happen to attain his age of twenty-one years*, his heirs and assigns for ever. W. and T. having died under twenty-one, it was held by Lord Chancellor Talbot, in accordance with a certified opinion of the Court of King's Bench, that the executory devise over to the other son of M. was good. In this case, it will be observed, M. (if she had been the paternal parent) might have died, leaving a child en ventre sa mere, so as thereby to prolong the suspension of the vesting for nine or ten months, in addition to the life and infancy. Indeed, if the prior devisee, on whose death under twenty-one the devise over was limited to arise, had been an infant en ventre sa mere, another period of nine or ten months would have been gained, making an aggregate period of a life, twenty-one years, and a double allowance for gestation: thus exhibiting the extreme point to which the postponement of the vesting can, under any possible circumstances, be pushed. It ought to be observed, however,

Gift to unborn person to vest at twenty-one, good.

Extreme period allowed by the rule.

(*a*) This additional period could only occur where the gift was to the children of a *man*.

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that no adjudged case has in its circumstances presented such an instance. In *Long* v. *Blackall*, 7 T. R. 100; *S. C.*, 3 Ves. 486, a limitation over to P. L., on the failure of issue male living at the death of a child en ventre sa mere, if a son, was held to be valid, on the ground that a double period of gestation (which would have occurred in case such child had died leaving issue male then en ventre sa mere) was allowable; but the vesting of the gift to P. L. was immediate on that event, and was not postponed until the age of twenty-one. There can be little doubt, however, that the Courts would hold, that, for all the purposes of the rule in question, a child en ventre sa mere is to be regarded as a person in existence.

Whether suspension for an absolute term of twenty-one years is allowable.

Still, the preceding cases left it undecided whether the period which the rule allowed to be added to a life was merely the infancy of the object of the future limitation (as in *Stephens* v. *Stephens*), or was an absolute term of twenty-one years irrespective of such infancy. The cases of *Marks* v. *Marks*, and *Lloyd* v. *Carew*, had certainly made a considerable inroad upon the latter hypothesis; for, in *Marks* v. *Marks*, an executory limitation to take effect in three months, and in *Lloyd* v. *Carew*, an executory limitation to take effect in twelve months after the expiration of a life, was held to be valid; and it could scarcely be contended that if *any* absolute term were allowed, that term might be less than twenty-one years; for there seems to be no principle or authority for drawing an intermediate line (*a*). Another argument in favour of the absolute term is, that the contrary doctrine would involve the denial of any certain period of postponement at all; and an executory devise, to take effect in ten or twenty years, even without a life, would be void.

In spite of these considerations, and notwithstanding that the rule had been more than once stated by Lord Kenyon, 1 Cox, 325, 7 T. R. 100, in a manner affirming the allowance of an absolute term (though, probably, without any distinct view to the point now under discussion); yet a writer, whose opinion carried great weight, Gilb. Us. by Sugd. 260, (2), strongly advocated the contrary doctrine; in which he was countenanced by the remark which had fallen from Lord Alvanley in *Thellusson* v. *Woodford*, 4 Ves. 377, "that the period of twenty-one years had never been considered as a term that might, at all events, be added to the executory devise or trust." The point at length arose in the case of *Beard* v. *Westcott*, 5 Taunt. 393, 5 Barn. & Ald. 801, Turn. & Russ. 25; one of the questions

Case of *Beard* v. *Westcott*.

(*a*) Sed vide Mr. Baron Bayley's judgment in *Cadell* v. *Palmer*, post, p. 163, which the Editor did not see until the observations in the text had been printed.

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in which respected the validity of an executory limitation in a will of great prolixity, limited to take effect "in case there should be no issue male of J. J. B. (a prior devisee), nor issue of such issue male at the time of his death (*a*), or in case there should be such issue male *at* that time, *and they should all die before they should respectively attain twenty-one.*"—J. J. B. died, leaving issue at his death. On a case sent from Chancery to the Court of Common Pleas, this Court certified in favour of the devise. The case was then returned to the Judges of the Common Pleas, their attention being specially pointed to the circumstance that the executory devise was to take effect after an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take, or that there might be issue of J. J. B. living at his death, who could not take under the prior limitations (in which an attempt had been made to limit terms determinable with life to the issue born and unborn, ad infinitum). The Court persisted in affirming the validity of the devise. A case was then sent to the Court of King's Bench, who certified the devise to be invalid (*b*); and Lord Eldon, before whom these conflicting certificates were brought, affirmed that of the Court of King's Bench, in order "to help the case to the House of Lords," (which, however, it never reached); his Lordship expressing the inclination of his opinion to be, that the Court of King's Bench was right.

Conflicting certificates of the Common Pleas and King's Bench as to the allowance of a term irrespectively of the infancy of the object to take.

The anxiety of testators and settlors to avail themselves of the utmost limit of the perpetuity doctrine did not permit that limit long to slumber in the obscurity in which the case of *Beard* v. *Westcott* had left it; for a similar question was soon afterwards raised on the will of Mr. Bengough, a gentleman of large property, resident and formerly a solicitor at Bristol. The testator, by his will, dated April 9th, 1818, devised all the residue of his real estate unto and to the use of trustees, their heirs and assigns, upon trust (after paying certain annuities), from time to time, during the term of twenty-one years, to be computed from the day of his (testator's) decease, to receive the rents, and lay out the same, as often as there should be a surplus amounting to 1500*l.*, in the purchase of freehold estates of inheritance; and the testator directed that the estates so to be purchased, should be conveyed to the use of the trustees, upon the trusts *there-*

Will of Mr. Henry Bengough.

(*a*) If this branch of the alternative had happened, *i. e.* if there had been no issue male living at the death of J. J. B., the devise over would have been good in event, according to the doctrine stated post, p. 179 et seq.

(*b*) Vide Mr. Baron Bayley's explanation of the grounds of this certificate in *Cadell* v. *Palmer*, post, p. 169.

inafter (*a*) declared concerning the real estate devised to them. After providing for the investment of the monies in the funds until a purchase could be made, the testator declared the trusts of his real estate as follows:—viz. that the trustees should stand possessed of the said trust estate for the term of one hundred and twenty years, to be computed from his decease, if several persons named (and who amounted in number to twenty-eight), or any or either of them, should so long live, *and also for the term of twenty years, to be computed from the expiration or sooner determination of the said term of one hundred and twenty years determinable as aforesaid,* in trust for testator's nephew, George Bengough, for ninety-nine years, if he should so long live, and the terms of one hundred and twenty years determinable as aforesaid, and twenty years, or either of them, should so long continue; and after the expiration or sooner determination of the said term of ninety-nine years, in trust for the first and other sons of the said George Bengough successively, according to the priority of their births; "and after the determination of the estate and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking, from time to time, under or as answering to the description of heir male of his body, in trust for the person who, for the time being, and from time to time, should answer the description of heir male of his body, or who, in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to such son and the heirs male of his body; to hold to the same son or person respectively, for a term of ninety-nine years, if the same son or person respectively should so long live, and the said terms of one hundred and twenty years determinable as aforesaid, and twenty years, or either of them, should so long continue; every elder of the same sons, and the person who for the time being, and from time to time, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being," &c.; remainder to numerous other persons and their sons, and the persons from time to time answering to the description of heirs male of their bodies, in the same manner; with an ulterior trust for the

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Suspension of vesting for one hundred and twenty years determinable with lives in being, and twenty years absolutely.

(*a*) The effect of this word literally construed would have been to exclude the after-purchased estates from the trust for accumulation, which was *antecedently* created; but the Vice-Chancellor considered himself to be warranted by the context to construe the word as inserted by mistake for "herein," or "hereinbefore."

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person or persons who for the time being should answer to the description of testator's heir or heirs at law, and if there should be more than one, in the same shares as they would be entitled to a real estate, descending from him (the testator) as the first purchaser; to hold to such person or persons, if more than one, as tenants in common, if the same person or persons should so long live, and the said terms of one hundred and twenty years determinable as aforesaid, and twenty years, should so long continue. The testator then provided, that in case the trusts could not take effect in the order intended, by reason that the persons entitled were not then born, the income during such suspension of ownership should be enjoyed by the persons next in remainder. And the testator then directed, that, after the expiration or sooner determination of the said terms of one hundred and twenty years determinable as aforesaid, and twenty years, the said trust estates should be settled by his trustees to and upon such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, or in tail, or in fee, in the same trust estates, if the same trust estates were by that his will devised, settled, or assured, in manner or to the effect following, that is to say, to the use of his nephew, George Bengough, and his assigns, for his life, with remainder to his first and other sons successively, according to the priority of their births, in tail male, with various remainders over. The testator then went on to direct that the person or persons to whom such conveyances should be made, should have such estates in the said trust estates as he or they would at that time be entitled to take under the said limitation, if actually made by his said will; yet, nevertheless, he directed and declared that no person should have a vested estate or any other than a *contingent* interest, until the expiration or sooner determination of the said terms of one hundred and twenty years determinable as aforesaid, and twenty years; and that in the event and in the mode thereinbefore expressed, heirs and heirs of the body should be entitled to take as purchasers. The testator then directed, that if, during the said terms of one hundred and twenty years determinable as aforesaid, and twenty years, each or either of the persons who should be entitled to the income of his said trust estates, should require the same, it should be lawful for the trustees to convey to him or her an estate of freehold, for his or her life, so as to give him or her an estate of freehold, instead of an estate for ninety-nine years determinable as aforesaid.

The testator also bequeathed the residue of his personal estate to the same trustees, their executors, administrators, and assigns, upon

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trust, during the period of twenty-one years from his decease (*a*), to receive the annual income thereof, and invest the same, and the accumulations thereof, in the 3*l.* per cent. Consolidated Bank Annuities, or upon mortgage, so as to form an accumulating fund, and from time to time lay out the same in the purchase of lands, to be settled upon the trusts before declared of his devised estates. The question as to the validity of the devises, the vesting of which was suspended for the terms of a hundred and twenty years determinable with lives, and twenty years absolutely, was raised upon a bill filed by the heir-at-law against the trustees.

Decree of the Vice-Chancellor in favour of the validity of the devises.

After an elaborate argument, Sir J. Leach, V. C., held the limitations in the will to be valid, observing, "that although the rule be framed by analogy to the case of a strict settlement, where the twenty-one years was allowed in respect of the infancy of the tenant in tail, yet he considered it to be fully settled, that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being:" *Bengough* v. *Edridge*, MS., also reported 1 Sim. 173. Against this decree the plaintiff appealed to the House of Lords, which, on the 30th May, 1833, put to the Judges several questions, which are referred to in their opinion delivered by Mr. Baron Bayley, who addressed the House as follows,—

Opinion of the Judges delivered by Mr. Baron Bayley.

"My Lords,—The first question proposed by your Lordships' House for the consideration of his Majesty's Judges is this—'Whether a limitation by way of executory devise is void, as too remote or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person;' and I am to return to your Lordships the unanimous opinion of the Judges who have heard the argument at your Lordships' bar, that such a limitation is not too remote, or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd* v. *Carew*, 1 Show. Parl. Cas. 137, in the year 1696, and *Marks* v. *Marks*, 10 Mod. 419, in the year 1719, established the point, that

(*a*) It is evident that the Thellusson Act (40 Geo. 3, c. 98, post) alone restrained this testator from creating an accumulating trust no less extensive than that of Mr. Thellusson.

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for certain purposes such time, as with reference to those purposes might be deemed reasonable beyond a life or lives in being, might be allowed. The purpose in each of those cases was to give a third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in the other were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being is not the limitation; that there are cases in which it may be exceeded. *Taylor* v. *Biddall*, 2 Mod. 289, 1677, is the first instance we have met with in the books, in which so great an excess as twenty-one years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Wharton, and their heirs, as they should attain the respective ages of twenty-one; there might be an interval, therefore, of twenty-one years between the death of Robert, till which time no one could be heir of his body, and the period when such heir should attain twenty-one, till which time the estate was not to vest; and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by and was the foundation of the decision in *Stephens* v. *Stephens*. That was a case of infancy also. The executory devise there was, 'to such other son of the body of my daughter, Mary Stephens, by my son-in-law, Thomas Stephens, as shall happen to attain his age of twenty-one years, his heirs and assigns, for ever;' and the Judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar. It refers to *Taylor* v. *Biddall*, and says, that, however unwilling they might be to extend the rules laid down for executory devises beyond the rules generally laid down by their predecessors, yet upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation would not be restrained longer than the law would restrain it, namely, during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity, and considering that such construction would make the testator's whole disposition take effect, which otherwise would be defeated, they were of opinion that that devise was good by way of executory devise.' This was also a case of infancy; it was on ac-

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count of that infancy that the vesting of the estate was postponed; and though under that limitation the vesting of the estate might be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might vest at a much earlier period. These decisions, therefore, do not distinctly or necessarily establish the position that a term in gross, for twenty-one years, without any reference to infancy, after a life or lives in esse, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle* v. *Wood*, in Lord Chief Justice Willes's Reports, 213, and also in a note in 7 Term Reports, p. 103, Lord Chief Justice Willes discusses shortly the doctrine of executory devises, and notices their progress of late years. He says, the doctrine of executory devises has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been under some restraints to prevent perpetuities. At first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, namely, to a child en ventre sa mere at the time of the father's death; because, as the contingency must necessarily happen within less than nine or ten months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to twenty-one years after the death of a person in being, as in that case, likewise, there is no danger of a perpetuity; and in citing this passage in *Thellusson* v. *Woodford*, 1 H. Bl. Rep. 388, Lord Chief Baron Macdonald prefaces it by this eulogium—'The result of all the cases is thus summed up by Lord Chief Justice Willes, with his usual accuracy and perspicuity;'—he does, indeed, afterwards say, (page 393), after noticing *Long* v. *Blackall*, 'the established length of time during which the vesting may be suspended is a life or lives in being, the period of gestation, and the infancy of such posthumous child;' and that rather implies that he thought the rule was confined to cases of minority. This opinion, though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of twenty-one years after the death of a person in esse, without reference to any

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minority, had been allowed; and though there be no such case reported, it does not follow that none such was decided (*a*). In *Goodtitle* v. *Goodman*, Burrow, 879, is this passage—Lord Chief Justice Mansfield says—'It is a future devise, to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being, and twenty-one years after, (which is the line now drawn, and very sensibly and rightly drawn).' This was published in 1766; and whether the last approving paragraph was the language of Lord Mansfield or the reporter, it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limit. In *Buckworth* v. *Thirkell*, 3 Bos. & Pul. 654, mentioned in a note, Lord Mansfield says—'I remember the introduction of the rule which prescribes the time in which executory devises must take effect to be a life or lives in being and twenty-one years afterwards.' In *Gee* v. *Audley*, 1 Cox, 325, Lord Kenyon, Master of the Rolls, says—'The limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of the Judges of all times, from the *Duke of Norfolk's case* to the present time; it is grown reverend by age, and is not now to be broken in upon.' In *Long* v. *Blackall*, 7 T. R. 102, Lord Kenyon, the same learned Judge, says—'The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations; and the Courts have stated that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements, the estate may be limited to the first and other sons of the marriage in tail; and, until the person to whom the last remainder is limited is of age, the estate is inalienable. In conformity to that rule, the Court have said, so far we will allow executory devises to be good.' And, after referring to the *Duke of Norfolk's case*, he concludes—'It is an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being, and twenty-one years and the fraction of another year, allowing for the time of gestation.' In *Wilkinson* v. *South*, 7 T. R. 558,

(*a*) [Surely, if the law is to be guided by decided cases, the argument in the text is very inconclusive, being in fact as complete an example of a petitio principii as could well be found; and it is remarkable that none of the passages afterwards cited from Blackstone and Fearne distinctly and explicitly indicate a term in gross. The law as it now stands must, it is submitted, be considered as having been *made* by this decision in the case of *Cadell* v. *Palmer*.]

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Lord Kenyon again says—'The rule respecting executory devises is extremely well settled, and a limitation by way of executory devise is good, if it may'—I think it should be *must*—'take place after a life or lives in being, and within twenty-one years and the fraction of another year afterwards.' We would not wish the House to suppose that there were not expressions in other cases about the same period, from which it might clearly be collected that minority was originally the foundation of the limit, and to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion that it was at length extended to the enlarged limit of a life or lives in being, and twenty-one years afterwards. It is difficult to suppose that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule as they did, without expressing minority as a qualification of the limit; particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding that the rule of twenty-one years was general, without the qualification of minority. Mr. Justice Blackstone, in his Commentaries, puts, as the limits of executory devises, 'that the contingencies ought to be such as may happen within a reasonable time, as within one or more life or lives in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity; the utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is, that of a life or lives in being, and twenty-one years afterwards; as when lands are devised to such unborn son of a feme covert as shall first attain twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest is the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise.' Mr. Fearne, in his elaborate work upon Executory Devises, lays down the rule in the same way:—'An executory devise to vest within a short time after the period of a life in being is good,' as in *Lloyd* v. *Carew*, which he states, and *Marks* v. *Marks;* and he says—'The Courts, indeed, have gone so far as to admit of executory devises limited to vest within twenty-one years after the period of a life in being, as in *Stephens* v. *Stephens*, *Taylor* v. *Biddall*, *Sabbarton* v. *Sabbarton;*' all of which he states, and in all of which vesting was postponed on account of minority only; and then he draws this conclusion—'so that the law seems to be now settled, that an executory devise, either

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of real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates.' The instances put—all instances of minority—might certainly have suggested that it was in cases of minority only that the twenty-one years were allowed; but by stating it generally, as he did, he must have considered twenty-one years generally, independently of minority, as the rule. The same observation applies to Blackstone. That such was the understanding of Fearne may be collected from many other passages in his book, but from none more distinctly than in the third division of his first chapter on Executory Devises, 7th edition, pages 399 and 401; where, after having mentioned, as the second sort of executory devises, those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee; and, after putting several instances, he then concludes the division thus:—'And the case of a limitation to one for life, and, from and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose) next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the second branch of the general distribution of executory devises.' And in his third chapter, page 470, he begins his eighth division with this position—'It is the same (that is, that an executory devise is not too remote), if the dying without issue be confined to the compass of twenty-one years after the period of a life in being.' And in the eighth division of Chapter 4, p. 177, he says —'It seems now to be settled, that, whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in the event of no one of the preceding limitations which would carry the whole interest happening to vest.' My Lords, the opinion of Mr. Fearne is continued in the different editions, from the period when his work was first published, in 1773, down to the present time; but, upon that expression, which occurs in *Thellusson* v. *Woodford*, in 4 Ves. 337, shewing a doubt existed in the mind of Lord Alvanley, that doubt is introduced into a subsequent edition, for the purpose of consideration; but it does not appear to me, from anything expressed by his great and experienced editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule; but, instead of that, he seems to have intimated that his opinion was in conformity to it; because he gives

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extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was, that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length, in *Beard* v. *Westcott*, 5 Taunt. 393, the question, whether an executory devise was good, though it was not to take effect till the end of an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir William Grant, the then Master of the Rolls; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and, lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that Court. The first certificate was in November, 1812, the next in November, 1813; and the Judges who signed them were Sir James Mansfield, Mr. Justice Heath, Mr. Justice Lawrence, Mr. Justice Chambre, and Mr. Justice Gibbs, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord Eldon to the Court of King's Bench; and that Court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote; but the foundation of their certificate was, that a previous limitation, clearly too remote, and which was so considered by the Common Pleas, made those limitations also void, which the Common Pleas held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion upon that, I am unable to say. I think the Court of King's Bench would have taken much more time to have considered that point than it did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial in the construction they were putting upon the will, to consider whether they were or not prepared to differ from the Court of Common Pleas, it is not to be wondered at that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Common Pleas in *Beard* v. *Westcott*, and the dicta by Lord Chief Justice Willes, and Lord Mansfield, and Lord Kenyon, and the rules laid down in Blackstone

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and Fearne, we consider ourselves warranted in saying, *that the limit is a life or lives in being and twenty-one years afterwards, without reference to the infancy of any person whatever.* This will certainly render the estate unalienable for twenty-one years after lives in being, but it will preserve in safety any limitations which may have been made upon the authority of the dicta or text writers I have named; and it will not tie up the alienation an unreasonable length of time. Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void, as too remote or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or en ventre sa mere, the unanimous opinion of the Judges is, that such a limitation would be void, as too remote. *They consider twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists.*"

Decision of the House of Lords establishing the validity of a suspension of the vesting for an absolute term of twenty-one years.

Lord Brougham, C.—"Your Lordships having heard the answer of the learned Judges in this very important case, it must be exceedingly satisfactory to your Lordships, feeling the importance and advantage of having a fixed and general rule upon a subject of this kind, to find that their Lordships have, after the fullest consideration, and after hearing this question argued at great length, come to the resolution they have stated to your Lordships. My Lords—with regard to the questions proposed, the first question was moulded on purpose to raise the difficulty that had been very much pressed at the bar, arising upon the manifest origin of this rule, it appearing, clearly, that it was originally not a term of twenty-one years in gross, any more than it now will be a term of twenty-one years and nine or ten months, but that it was originally introduced in consequence of the supposition of infancy with which that question was connected; but whatever may have been the origin of the rule, it appears now to have become an inveterate rule, and may be said to be established by decisions and dicta. One of the earliest of the cases that have been cited was wholly unconnected with infancy. I allude to the remarkable case of *Lloyd* v. *Carew* (*a*), in Shower's Parliamentary Cases, which is the more worthy of attention as it must have received the fullest consideration, for it was a decision of the Court of the last resort, and it was a decision reversing the judgment of the Court below,

(*a*) [But see ante, p. 164, Mr. Baron Bayley's exposition of this case.]

that being a judgment of the Court of Chancery assisted by the Lord Chief Justice of the Court of Common Pleas and one of the other learned Judges; and the decision pronounced by that Court under those circumstances, clearly shewing the attention paid to it in all its stages, would not have been reversed by this House without the most full and elaborate consideration. That circumstance gives the case of *Lloyd* v. *Carew* a weight beyond what, under the other circumstances, it would receive, and entitles it, in all cases, to great consideration; it shews that the whole argument upon the matter must have been fully gone into, and that your Lordships' House must have been fully acquainted with the difficulty now stated of considering any thing beyond a life or lives in being in gross, and unconnected with any thing else as decisive. My Lords—some doubt was expressed, and there was, perhaps, some ground for it, whether this had been the uniform opinion of the conveyancers in their practice. I think it is impossible to read the passages in Fearne to which reference has been made by Mr. Baron Bayley, and to have any doubt that he considered it a matter so clear, that he did not make it a ground for discussion or argument, but takes twenty-one years as the period admitted to be the rule. The learned editor of that work issued various editions of it, until the questions arose in the Court of Chancery in *Thellusson* v. *Woodford*, and the opinion of Lord Alvanley, the Master of the Rolls, was then brought into consideration, and gave rise to the part that has been added in the subsequent editions of the work; and Mr. Butler, in the last edition, which is not here, makes it the subject of a separate paper. This was after the case of *Thellusson* v. *Woodford*, which was ultimately decided by this House; and I have no doubt that Mr. Butler would have treated the subject in the same way as it had been treated by Mr. Fearne. The opinion of Lord Mansfield, in the case cited of *Taylor* v. *Biddall*, is very strong to the same purpose; as though what has been cited from Lord Kenyon, both when at the Rolls and in the Court of King's Bench, refers to the period of gestation, and might be supposed to prove too much; yet the current of all the other authorities certainly is confined to twenty-one years, and leaves no doubt of that which has been so soundly stated by the learned Judges in their opinion. My Lords—it was necessary to state the first question with the view of raising the difficulty, and letting the Judges have their attention called to it, that they might grapple with it. They have done so, and they have not shrunk from giving it their best consideration. It was equally necessary to state the second and third questions, in order that no doubt might arise upon the point as to the twenty-one years connected with infancy, and whether it might not be capable of being

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extended still further. The learned Judges have applied their minds to those questions, one as to the average period of gestation, and the other the longest; and they are of opinion that the authorities exclude any such period from being added to the twenty-one years. If your Lordships should be of opinion with the learned Judges, and so to deal with the case of *Cadell* and *Palmer*, which has called forth this discussion, if your Lordships should be of opinion to dispose of that case according to the unanimous opinion of the Judges on the question submitted to them, the rule will henceforth be, that an executory devise is not too remote if twenty-one years is added beyond the existence of a life or lives in being, but that beyond that point any further time would be too remote." Judgment of the Court below affirmed: *Cadell* v. *Palmer*, in Dom. Proc. 25th June, 1833, MS. [7 Bligh, N. S. 202.]

Cadell v. *Palmer*, in Dom. Proc. 25th June, 1833.

[On this subject Mr. Jarman has the following observations in his Treatise on Wills (Vol. i. p. 222):—"A possible addition of the period of gestation to a life and twenty-one years occurs in the ordinary case of a devise or bequest to A. (a person of the male sex), for life, and after his death to such of his children as shall attain the age of twenty-one years, or, indeed, in the case of a devise or bequest simply to the children of A. (a male), who shall attain majority, though not preceded by a life-interest; in either case A. may die, leaving a wife enceinte, and, as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of twenty-one years beyond a life in being, with the addition, it might be, of nine or ten months; and if, to either of these supposititious cases, we add the circumstance that A., the parent, were (as of course he might be) an infant en ventre sa mere at the testator's decease, there would be gained a double period for gestation (namely), one at the commencement, and another at an intermediate part of the period of postponement. To treat the period of gestation, however, as an adjunct to the lives, is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child en ventre sa mere is considered as a life in being."]

An executory devise to arise on an indefinite failure of issue void,

To the test of this rule, the limits of which have been thus finally settled by the highest judicial authority, every gift of real and personal estate, created by will or otherwise, must be brought. The application of such test instantly shews, that an executory limitation in a deed or will, to arise on an indefinite failure of issue, must be void for remoteness; *Badger* v. *Lloyd*, 1 Salk. 232; *Moore* v. *Parker*, 1 Lord Raym. 37; *Lady Lanesborough* v. *Fox*, Forrest, 262;

[but see stat. 7 Will. 4 & 1 Vict. c. 26, s. 29, as to wills made since 1837]; though it is to be observed, that, in this and all other cases, if the executory devise is limited in defeazance of an estate tail, it will be good, because the power which resides in the owner of that estate to destroy all posterior limitations, executory as well as vested, by means of [an enrolled conveyance (now substituted for] a common recovery), takes the case out of the mischief of, and consequently out of the rule against, perpetuities: *Gulliver* v. *Ashby*, 4 Burr. 1929. Thus, if a person, by deed or will, creates an estate tail, and annexes to it a proviso divesting the estate in favour of another, in case the devisee, or his issue in tail, should at any time thereafter neglect to assume the name and wear the arms of the testator; or in case another property should devolve to him or them, or on any other such event, this executory limitation, though it would have been clearly void if annexed to an estate in fee-simple, is good, as applied to an estate tail: *Nicholls* v. *Sheffield*, 2 B. C. C. 215; *Carr* v. *Earl of Erroll*, 6 East, 58 (*a*).

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unless engrafted on an estate tail.

(*a*) [Precedents of clauses for successively shifting estates may be found in 1 Sanders on Uses and Trusts, Appendix, No. II. (4th ed.), and in Butler's note (2), (II. 2), to Co. Litt. 327. a. It would seem, however, to be a very difficult feat of conveyancing to draw these clauses in such a manner as to effectuate the object; that is, to guard effectually against the object's being defeated by a recovery on one hand, on the other by its being declared void for remoteness. The difficulties of this question are exemplified in the case of *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 Ad. & Ell. 2; *S. C.*, 4 Nev. & M. 724, where lands were devised to A. for life, remainder to his first and other sons in tail male, remainders to B. and other younger brothers of A. successively for life, and their sons successively in tail male, remainders over, with a proviso, that, if the earldom of S. should descend upon A., or any of his brothers, or any of his or their sons, within the period of certain lives, or within the term of twenty-one years after the decease of the survivor, his or their estate should cease, and the lands go over as if he or they were dead without issue. The title descended to A. while in possession of the lands, whereupon B. took possession. B. being in possession, a common recovery was suffered, in which the lands were conveyed (by lease and release by B. and his eldest son) to a tenant to the præcipe, during the joint lives of such tenant and B.; and B.'s eldest son was vouched over, but B. was not vouched. The earldom afterwards descended to B. The question most discussed in the case was, whether the proviso operated merely to determine the estates of the person taking the title and his issue, leaving the remainders to the other branches of the family to take effect under the original limitations, or whether, instead of leaving the original remainders to take effect, it created new estates exactly similar to and in lieu of those remainders. On which latter construction the recovery suffered by a tenant in tail in remainder would be inoperative, if his estate tail were afterwards prevented from taking effect by the descent of the title on the tenant for life. The Court of King's Bench was of opinion, that the proviso operated not by way of determining or defeating the estate tail of the son of B., but antecedently to that estate by preventing the estate tail from ever vesting in pos-

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Whether a remainder, which is destructible, can be void for remoteness.

The same reasoning might seem to apply, in some degree, to contingent remainders not rendered indestructible by an estate created for their preservation; but the Editor is not aware of any authority for the application of the doctrine to such cases. If, therefore, freehold lands, of which the legal inheritance is in the testator, were devised to A., for life, with remainder to his eldest son who should be living at his decease, for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease, although A. in his lifetime might destroy all the remainders, and the eldest son, after his decease, might destroy the ulterior remainder in fee devised to his children, without being, in the slightest degree, amenable either at law or in equity to the persons whose estates are thus destroyed, such remainder would, nevertheless, it is conceived, be void for remoteness, on the ground that the destruction in such cases being effected by what the law calls a tortious or wrongful act, it is not to be presumed that such a wrong will be committed. [In the case of *Colf* v. *Sewell*, 2 Con. & Law. 344, 4 Dru. & W. 1, the exemption of contingent remainders from the operation of the rule against perpetuities was emphatically asserted by Sir E. Sugden, for the reasons above suggested. But see the observations of Mr. Jarman on that case, 2 Treat. on Wills, 727. The recent

session, and, being antecedent to that estate tail, could not be affected by the recovery; and that the lessor of the plaintiff took under the will two interests, one a vested remainder in tail, which was barred, the other a mere possibility, which, on the descent of the title upon the defendant, became a *new* estate tail, and which was not barred: 3 Ad. & Ell. 42, 44. But it was held in the Exchequer Chamber (*Earl of Scarborough* v. *Doe* d. *Savile*, 3 Ad. & Ell. 897, reversing a decision in the King's Bench) that the proviso created no *new* estate on the descent of the title, but was a mere proviso for the cesser of the old estates created by the will to which it applied, so as to accelerate the remainders over; that the lessor of the plaintiff could claim only by virtue of the limitation expectant upon the estate tail of B.'s eldest son; and that the recovery defeated such a limitation. There were still, however, doubts in the profession as to the soundness of this decision, and it was at one time intended to carry the case before the House of Lords, but this intention was abandoned from other considerations. It was intimated in the course of his argument by the counsel for the plaintiff in error (Sir W. W. Follett) that if the testator had intended the shifting of the estate more than *once*, he would have used a form similar to those referred to at the beginning of this note. And Tindal, C. J., in delivering the judgment of the Court of Exchequer Chamber, said: "The proviso is, in its ordinary construction, one of cesser and determination only, thereby accelerating the old estates. The words contained in the first branch of the proviso itself point to nothing else:—'The estate which he or they shall then be entitled unto,' 'shall then cease, determine, and become void.' These are the operative words of the proviso, words of express cesser and determination, in which there is the total absence of the expression of any intention to create a new estate."]

enactment protecting contingent remainders from destruction (8 & 9 Vict. c. 106, s. 8), has introduced into the question a new element of difficulty.]

Terms of years, trusts of, when void.

[If the trusts of a term, which is precedent to the estate tail, and consequently cannot be defeated by the acts of the tenant in tail, Co. Litt. 203. b. n. 1. sect. 4; *Eales* v. *Conn*, 4 Sim. 65; and see *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 Ad. & Ell. 16, 17, are not to arise until the failure of issue under the entail, those trusts are necessarily void. Thus, in *Case* v. *Drosier*, 2 Kee. 764 (affirmed, 3 Jur. 1164), where a testator devised two estates to trustees for 500 years, and, subject thereto, he then devised one estate to A., for life, with remainder to his sons and daughters in tail in strict settlement, in the usual manner, with remainder to B. and his sons and daughters, in like manner. He then devised the other estate in a similar manner, mutatis mutandis. The testator declared the trusts of the term of 500 years to be for the purpose (among others) of raising portions for two granddaughters, payable at twenty-one or marriage, and further portions in case either A. or B. should die without issue. Lord Langdale said: "The strong inclination of my opinion is, that he meant such issue as he had described in the former limitations; but whether so or not, he has directed the sums to be raised on failure of that issue. It might be at a very remote period, and there are no means by which the charges, in this case, could be barred; they depend on a term, and that term is precedent to the estates tail, so that after a recovery there would remain a term and a trust to be performed: a trust which could not be defeated, and a term which cannot be destroyed." See *Browne* v. *Stoughton*, 14 Sim. 369.]

Most frequently occurring cases of remote gifts.

The most frequent instances of gifts rendered void by their transgressing the rule against perpetuities, occur in devises or bequests to classes comprising either individuals who are not in esse at the death of the testator, and the vesting of whose shares is postponed beyond majority, or persons who do not necessarily come into existence, if at all, during a life in being and twenty-one years afterwards.

Gift to an unborn class, to vest after majority.

An example of the former is furnished by the common case of a gift to a person for life, and after his decease to his or her children who reach an age subsequent to majority; which, as it would, if allowed, have let in objects born after the death of the testator, and the vesting of whose shares might be postponed for more than twenty-one years after the decease of the tenant for life, is (unless in the excepted case presently noticed) necessarily void for remoteness. The books are replete with cases of vacated gifts of this nature.

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Devise to grandchildren who shall attain twenty-four, void.

[Mr. Jarman, in his Treatise on Wills, Vol. 1, p. 227, gives, as a very simple illustration of these, the recent case of *Newman* v. *Newman*, 10 Sim. 51, 8 Law Jour. N. S. 354, where a testator devised his freehold estate to his son A. for life, and after his decease to trustees, who were directed to sell and apply the proceeds of the sale in trust for all his grandchildren (the children of four children named in the will), who should attain the age of twenty-four years, equally, to be divided among his grandchildren attaining such age; Sir L. Shadwell, V. C., without hesitation, held that the trust for the grandchildren was void for remoteness.] So, in the case of *Vawdry* v. *Geddes*, 1 Russ. & Myl. 203, where a testatrix bequeathed the produce of her residuary estate in trust for her four sisters for their natural lives, and directed, that, on their decease, the interest of their respective shares should, at the discretion of her executors, be applied in maintenance and education, or accumulate for the benefit of the children of each of the sisters so dying, until they should severally attain the age of twenty-two years; and, upon any of their attainment to that age, they should be entitled to their mother's share of the principal; with limitations over in case of their dying under that age. It was attempted to support the bequest upon two grounds: first, that the children of the sisters took vested interests at their birth, subject to the contingency of being divested in the event of death under twenty-two years of age; secondly, that the bequest was to be confined to children in esse (*a*) at the death of the testatrix; but Sir J. Leach, M. R., negatived both these grounds, being of opinion that the vesting was postponed to the age of twenty-two, and that the bequest let in all the children born before or after the death of the testatrix, and consequently, that the trust for the children was too remote and void. See also *Leake* v. *Robinson*, 2 Mer. 363; *Bull* v. *Pritchard*, 1 Russ. 213; [*Judd* v. *Judd*, 3 Sim.

Legacy to unborn children at twenty-two, held to be void for remoteness.

(*a*) ["It is a consequence," observes Mr. Lewis (Law of Perpetuity, p. 456), "of the rule, which denies the liberty of looking at actual events in considering the validity of executory limitations, that, since the attainment of the required ages by the children is not confined to the period allowed by law, no regard can be had to the circumstance of *some* of the children acquiring the capacity of taking within the proper time, or, even of such being the case with respect to *all* the children; but the gift is absolutely void to the same extent as if it had actually happened that no one child had become entitled within the period of legal remoteness. The gift is, in a word, either wholly good or wholly void; to be valid, it must be provided that the children who are to take, by attaining twenty-five, must attain that age within twenty-one years from the death of A.; and in such case they who answer the required description will take the *whole* property bequeathed; without such restriction the gift will be entirely bad, whatever be the course of subsequent events."]

525; *Porter* v. *Fox*, 6 Sim. 485; *Dodd* v. *Wake*, 8 Sim. 615.] It is observable, that if, in *Vawdry* v. *Geddes*, any of the testatrix's sisters had died, leaving a child less than a year old, the share of such child would not have vested until more than twenty-one years after the mother's decease, and consequently not until after the period allowed by the rule of law. RULE AGAINST PERPETUITIES.

It is proper to remark, that, in the class of cases under consideration, a limitation which would, as an executory devise, be void for remoteness, may be good as a contingent remainder, on account of the necessity which the rules applicable to contingent remainders impose, of its vesting, if at all, at the instant of the determination of the preceding estate for life, which being limited to a person who was in existence at the death of the testator, necessarily restricts the devise within proper limits. Thus, if lands of which the testator had the legal inheritance, were devised to A., for life, with remainder to his children in fee, who should attain the age of twenty-two, the devise would be good, because, if, at the decease of A., no child had attained the vesting age, the remainder would fail, under the doctrine in question. See Fea. C. R. 4. Distinction in regard to remainders.

Where the vesting of a gift to unborn persons is postponed for a fixed term exceeding twenty-one years, not preceded by a life, the gift is necessarily avoided. In such a case, it will be observed, the effect is precisely the same as if the vesting of the shares of such unborn persons had been protracted beyond majority, since the objects who happen to (as all may) be born more than twenty-one years before the vesting, are of course past their majority when such vesting takes place. Thus, where a testator bequeathed 2500*l.* Bank Stock, upon trust to raise an accumulated fund, and to transfer such fund unto all and every the child and children of his son C. T. H., who should be living at the expiration of twenty-eight years, to be computed from the testator's decease, except an eldest or only son; and, in case no such child should then be living, then to the children then living of J. S., another son, and in default of such child to J. S., if living, and so on to the children of two daughters whom he named, with the like substitution of those daughters—Sir J. Leach, M. R.—"The expressed intention of the testator is, that all the children of his son C. T. H., other than an eldest son, should take, who were living at the expiration of twenty-eight years, and that no person should take before that period. If C. T. H. had such children born to him at any time within seven years from the testator's death, then the vesting of the interests of such children, who were unborn at the death of the testator, would have been suspended for more than Effect of postponement for more than twenty-one years without a life.

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twenty-one years, and the gift, therefore, is too remote, and void; and the gifts over not being to take effect until after the same period, which is too remote, are necessarily void also (*a*):" *Palmer* v. *Holford*, 4 Russ. 403.

The principle of this case clearly would apply where any, the most inconsiderable, addition was made to the term of twenty-one years; for the fact of the testator not having availed himself of the allowance of a life does not enable him to take a larger number of years. It is clear, therefore, that a devise to such of the grandchildren of the testator as should be living at the expiration of twenty-one years and *two days* from the testator's decease, would be void.

Gifts originally void not validated by subsequent events.

Where a devise or bequest to a class, according to the state of circumstances existing at the death of the testator, may happen to comprehend objects who are beyond the legal boundary, the fact that it does not eventually comprise *some* of such objects, [will not render it valid quoad those objects: *Leake* v. *Robinson*, 2 Mer. 363; *Bull* v. *Pritchard*, 1 Russ. 213. And even if *all* the individuals actually composing the class are within the line, this fact will not render the gift valid: *Jee* v. *Audley*, 1 Cox, 324.] Thus, if a sum of money were bequeathed to A., for life, and, after his decease, to his children who should attain the age of twenty-two years, though all the children of A. happen to be born in the lifetime of the testator, and therefore might have taken under a gift confined to children so born, and attaining the prescribed age of twenty-two years, yet, as their claim must be made as members of a class which is too remote, their individual competency can avail nothing. [(See *Harris* v. *Davis*, 1 Coll. 424.) And where the testator had combined with the remote class, a living person, in such a manner as to constitute him a member of the class, Sir L. Shadwell, V. C., said:—"If the whole of the testator's intention cannot prevail, effect cannot be given to any part of it. It would be inconsistent with that intention to allow T. O. to take a third share of the fund; for the testator meant each person's share to be determined by the number of the class, consisting of his grandchildren and T. O., who should be living when the first attained twenty-five: *Porter* v. *Fox*, 6 Sim. 485.]

[As to the application of the doctrine (that the validity of a gift is to be tried by possible not actual events) to individuals, and as to the distinction between a testator's providing for his own grand-

Observation on *Palmer* v. *Holford*.

(*a*) It will be perceived that his Honor pronounced all the bequests over, without distinction, to be void; though one of those bequests was to the son himself, subject to the contingency of his being alive at the expiration of the twenty-eight years, which necessarily confined it to a life in being.

children, and the grandchildren of another, see 1 Jarm. on Wills, 233, 234.] RULE AGAINST PERPETUITIES.

[The principle governing the distinction between gifts to individuals and gifts to classes has been expressed by Sir W. Grant, M. R., in the case of *Leake* v. *Robinson*, 2 Mer. 363, see post, p. 185, with admirable clearness and brevity:—"To induce the Court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, viz. a series of particular legacies to particular individuals, or, what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death."] Distinction between gifts to individuals and gifts to classes.

Gifts, however, may be so framed as to be valid or not, according to events, bringing them within, or placing them beyond, the allowed line. An example of such a devise is afforded by a case in the House of Lords, where a testator, after devising lands (subject to certain terms for years, which he created for the purposes thereinafter mentioned,) to A. for life, remainder to his first and other sons in tail male, with remainder to the eldest daughter of A. in tail general, with remainders over, directed that when a certain sum of money should be raised out of the rents of his lands, under a term of sixty years (*a*), the same should be settled to the use for life of the person who happened then to be entitled in possession under the limitations in his will, with remainder to his issue in strict settlement (*b*). When the time arrived for laying out the money, it happened that the person entitled in possession under the limitations in question was not in esse at the testator's death, and therefore could not be made tenant for life, with remainder to his issue; so that the trusts for laying out the money had failed *in event: Tregonwell* v. *Sydenham*, 3 Dow, 194. The grounds on which Lord Eldon rested the decision of the House in this case conclusively shew, that if the person entitled in possession had been a person in esse at the testator's death, the trust for laying out the money would have been legal: so that the case affords an exact illustration of the doctrine in question. Gifts may be moulded according to subsequent events.

(*a*) This was prior to the stat. 40 Geo. 3, c. 98, post, 196.

(*b*) This was the effect, though not the precise language.

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[In the case of *Lord Deerhurst* v. *Duke of St. Alban's*, 5 Madd. 232, the testator, Lord Vere, gave certain furniture, plate, and other articles, to trustees, upon trust that his wife should have the use of them for her life, and then for the use of his son for his life, and, after the death of the survivor of his wife and son, upon trust for such person as should from time to time be Lord Vere, it being his will that the said furniture, &c., should, after the death of his wife, be held and enjoyed with the title of the family, as far as the rules of law and equity would permit. At the death of the testator, the title of Lord Vere descended upon his son, the legatee for life, upon whose decease it descended to his son, the testator's grandson, who was living at the death of the testator, and, upon the death of the grandson, it descended to his son, the testator's great-grandson, who was born after the death of the testator. The principal question was, whether the personal representatives of the grandson or those of the great-grandson were the parties entitled. "As the former," observes Mr. Jarman, (1 Treat. on Wills, 236), "was born in the testator's lifetime, it was clear, that he *might* have been made legatee for life, with remainder absolutely to the person next in succession; and the question, therefore, was, whether the will authorised such a construction." Sir J. Leach, V. C., before whom the case was originally brought, decided in the affirmative. His Honor observed: "He gives to such person as shall from time to time be Lord Vere, because his purpose is, that the enjoyment shall be continued with the title of the family, as far as the rules of law and equity will permit; in other words, he gives to such person as shall from time to time be Lord Vere, with a declaration that each Lord Vere, in succession, shall take the use and enjoyment until there be a Lord Vere; who cannot, by the rules of law and equity, be confined to the use and enjoyment only. This declaration, therefore, is nothing more than a legal qualification of the prior general description of his legatees; and the effect is the same as if the will had been in the following form: 'upon trust for such person as shall from time to time be Lord Vere, it being my intention that the absolute interest shall not vest in any Lord Vere, who may, by the rules of law and equity, be limited to the use and enjoyment only.' In this view of the case, there is a direct gift, and nothing executory. By the rules of law and equity, every person living at the death of the testator, who should become Lord Vere, might be limited to the use and enjoyment only. The son and the grandson of the testator were living at his death, and were both, therefore, limited to the use and enjoyment only; but the child who succeeded the grandson as Lord Vere and Duke of St. Alban's, was

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not living at the death of the testator, and could not, therefore, by the rules of law and equity, be limited to the use and enjoyment only. He took, therefore, an absolute interest, which is now vested in his personal representative."]

[The case was then brought by appeal successively before Lords Eldon and Lyndhurst, the latter of whom affirmed the judgment of the Vice-Chancellor; but the decree of the Court below was eventually reversed, after an elaborate argument in the House of Lords. The Lord Chancellor (Lord Brougham) said: "This is a case of the greatest difficulty, and wholly without any applicable precedent." His Lordship, after shortly commenting on those authorities in particular which had been cited, and which might be thought to cast a glimmering of light upon the case, thus proceeded: "The case, therefore, has been argued and must be decided upon principle. It is admitted, that, in the events which have happened, the end would not have been attained by the testator's vesting the interest in Duke William, and even in a succeeding Lord Vere, but with a qualification to determine all interest on events happening within the limits of the rule: or it might have been effected by annexing the gift to the limitations of the land, and directing that the chattels should go in the same course of limitation. But to annex personal chattels to a title of honour is equally difficult upon any view of the nature of the estate in a dignity, whether it is to be considered as a succession of inheritances, and whether in fee or in tail, even if it is in each individual an estate only for life, a subject cannot engraft on such an estate, by way of limitation, estates for lives in perpetual succession, so as to make each of them a purchaser. If he attempts to create a fee tail in chattels, the interest vests absolutely in the first quasi donee in tail. It is a new species of investiture or limitation of estate unknown to the law, treating the Lords Vere as a species of corporation sole, to whom the estate is to be limited. The person who secondly, after the death of the testator, became Lord Vere (the grandson) was in esse at the date of the will; but whether he would take, or whether he would ever be Lord Vere, was at the time uncertain. The next life estate after those named in the will was not to the person by name, but to the Lord Vere, whoever he might be. It was an attempt to create a new species of limitation in succession to spring up with the person, contrary to all rule and analogy for restricting the period of tying up or deferring the vesting of estates in fee or absolutely. Being or coming into esse is a notion familiar to the law. But a peer does

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not, in a legal sense, come into existence. It was argued for the respondent, that it was the same thing as limiting to the son and grandson and great-grandson successively, because they must succeed to the inheritances of the dignity in this order. But that view is not quite accurate; for it was not certain that either of them would be Lord Vere. Upon a barony in fee, by writ of summons or creation, the first taker might have a son, and that son might have only two daughters; what person would then take the title? It would be in abeyance; and until the Crown should please to select one of them to hold the dignity, it would remain in abeyance, and there might be no peer during the lives of the two co-heiresses. In the case put of an abeyance of the title, the Crown might not select either or any of the daughters; and, in that case, the title might remain in abeyance for a century; and such an event would demonstrate that the limitation is not partially, but altogether void. It is said that the case has not happened; but the soundness of the limitation cannot depend upon contingencies which may cause it to be good or bad, according to the event. Suppose, again, the limitation of this peerage to be by patent. If the eldest son had a brother who would succeed in default of issue of the eldest son, who afterwards commits treason and is attainted; during the life of that son, and so long as there is any issue of that eldest son, the title would remain in abeyance. The title would not be extinct; but would be in the Crown, so long as any of his issue should exist; and, upon failure of the issue of the attainted person, there might again be a Lord Vere. These instances shew the novelty of the invention, and the difficulty of giving it complete effect. There is a distinction between limitations upon events known to the law, and such as the testator in this case has made the basis of his limitation. Peerages are not by the hand of nature, but of the creation of the Crown; and their origin and continuance is uncertain. To argue from the fact, that the person was in esse at the date of the will, who became Lord Vere, is to rely upon an accident. The event might have been otherwise. He would not ex necessitate answer the description within the allowed period. A limitation to be supported must be definite and certain to the man or to the peer as an individual. It is not allowable to contend, that, at one time and for one purpose, it is to the man, and for another time and purpose to the peer. The estate must be certain, so as within the time to vest in the person described, either in his natural or his politic capacity. In the politic capacity, there was no such Lord Vere in esse in whom the estate could within that time certainly vest. Upon the grounds

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which I have stated, I find it impossible to advise your Lordships to affirm this decree."]

[Lord Lyndhurst observed, "that he did not give the judgment in the Court below entirely without doubt; and, upon the whole, was of opinion that it would be the safest course to reverse the decree, if it were only to repress such inventions." He further observed, "that the arguments upon the subject of the abeyance of peerages urged by his noble friend the Lord Chancellor were entirely new; that, in affirming the decree, the House must decide against a strong current of authorities; but not so if they reversed it:" *Tollemache* v. *Earl of Coventry*, 8 Bligh, N. S., 547.]

Gifts alternative in substance though not in expression.

And it is to be observed that gifts may be alternative in substance, by the effect of the rule of construction applied to them, which are not alternative in expression; for instance, in the case of a gift to A. for life, and after his decease to the children of A. who shall attain the age of twenty-two years; if A. should die in the lifetime of the testator, as this event would confine the gift to persons in esse at the testator's decease, without the possibility, *according to events subsisting when the will takes effect*, of its comprehending a wider range of objects, such gift, it is conceived, is valid, and might be so held without any violation of the principle which precludes the construing the gift according to subsequent events, though probably not in complete coincidence with the terms in which such principle is sometimes laid down (*a*).

Some points suggested as to gifts being valid according to event.

(*a*) Would a devise or bequest, to such one of the children of A. as shall first marry, be void ab initio? or would its validity depend on the event of A. having a child, who should marry under the age of twenty-one? If the rule be, as is often stated, that the gift must *necessarily* take effect within the period fixed by the rule of law, it would be absolutely void; but if, in applying this rule, we are to look at events existing at the testator's decease, there would be ground to contend, that, in the event of a child of A. marrying in the testator's lifetime, the gift would be good, though certainly the principle which regulates the construction according to events at the testator's decease, is more open to exception as applied to such a case as this, than in the instance suggested in the text, of a gift to a class, the objects of which are to be ascertained at that period; for a gift to the children of A., a living person, may be considered as amounting in effect to a gift to the children of A. who shall be living at my decease, if A. dies in my lifetime, or to such as shall be then living and shall thereafter be born, if A. survives me. The Editor, however, ought to add, that the suggestion he has ventured to offer in favour of the possible validity of devises of this nature is founded on a view of general principles alone, and not on authority; for he is not aware of any decided case bearing immediately on the point. [In his Treatise on Wills, Vol. I. p. 229, n. (*s*), Mr. Jarman observes, that at one period he was rather inclined to the adoption of the hypothesis (and he refers to the foregoing passage), that if there is according to the state of events *at the death of the testator*, no possibility of an addition being made to the

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Gift alternative to one too remote, also void.

Where an executory gift is made in favour of too remote an object, an alternative gift, which is to arise simply in default of such object, will be also void, although the failure of the object of the prior gift occurs under circumstances which would have admitted of a valid gift over being limited. Thus, where a testator devised to the first or other son of Thomas Proctor that should be bred a clergyman, *and be in holy orders*, and to his heirs and assigns; *but if the said T. P. should have no such son*, then to T. M., his heirs and assigns. T. P. died without ever having had *any* son. As by the canons of the church no person can be admitted into deacon's orders before the age of twenty-three, or be ordained priest before twenty-four, it was clear that this qualification postponed the devisee's interest until he attained the age of twenty-three at the least. The Court of Common Pleas, therefore, held the first devise to be void for remoteness, and that the devise over, as it depended on the same contingency, was also void; observing, that there was no instance of a limitation after a prior devise, which was void for the contingency's being too remote, being let in to take effect: *Proctor* v. *Bishop of Bath and Wells*, 2 Hen. Bla. 358. See also *Robinson* v. *Hardcastle*, 2 B. C. C. 22, 2 T. R. 241, 371, 380; *Cambridge* v. *Rous*, 8 Ves. 12.

Distinction where the second gift is to arise on a collateral event.

Care should be taken, however, to distinguish between the cases just mentioned and those in which the second or substituted devise is not simply alternative to the first, but is made to arise also on some collateral event; [or is to arise on an alternative event, one branch of which is within, and the other is not within the prescribed limits, so that the gift over will be valid, or not, according to the event;] as if, in the case of *Proctor* v. *Bishop of Bath and Wells*, the devise over, instead of being to take effect only in the event of T. Proctor having no *such* son (i. e. a son taking holy orders), had been limited to arise also in the event of his not having *any* son. Provision would then have been made for two distinct events: one, the devisee not having any son; the other, the not having a son who should take orders: and since the former would necessarily take place within the period allowed by law, and the latter would not, the validity of the devise over would depend upon whether one or the other event happened.

class, the devise would be good; but that subsequent consideration has induced him to doubt its soundness. "It seems," he adds, "according to the principle of the general current of the authorities, to be the better conclusion, that, in order to establish the invalidity of a bequest, whether to a class or an individual, it is sufficient to shew that events *might* have occurred *subsequently to the date of the will*, which would have let in objects beyond the perpetuity line."]

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Had the will been so framed, in the event which happened, the devise over would have been valid (*a*).

An instance of this species of limitation is afforded by the case of *Leake* v. *Robinson*, 2 Mer. 363, where certain stock and monies were bequeathed to A. for life, and after his decease to the child or children of A., who, being a son or sons, should attain the age of twenty-five, or, being a daughter or daughters, attain that age or be married with consent; and in case A. should die *without leaving issue living at the time of his decease*, or, *leaving such, they should all die before any of them should attain twenty-five*, if sons, and, if daughters, before they should attain such age or be so married, then over. A. died without leaving issue, and it was not contended, that, *in the events which had happened*, the bequest over was void on any other ground than that of the remoteness of the objects of the ulterior bequest, who were a class of persons possibly unborn at the death of the testator, and whose shares did not vest until the age of twenty-five. See also *Crompe* v. *Barrow*, 4 Ves. 681; *Cambridge* v. *Rous*, 8 Ves. 12.

Effect of possession only being too remote.

The circumstance of the *possession* being postponed beyond the limits prescribed for the *vesting* of estates, does not affect the validity of the gift, the only effect of the application of the doctrine in question being to accelerate the possession. Thus, where lands were devised to trustees and their heirs, in trust for A. for life, remainder in trust for B. for life, remainder unto and amongst all and every the issue, child, and children of B. as should be living at the time of the decease of the survivor of A. and B., to be divided share and share alike, *when and as they should respectively attain the age of twenty-four years*, and to their respective heirs, &c.; and if only one, then the whole to such only or surviving child, in fee, *upon attaining the said age*. It was contended, that the gift to children was too remote;

(*a*) It is certainly rather singular that the Courts originally did not, in support of the limitation over in cases of this nature, supply the words necessary to extend it to the event of there being no son at all, which (though *now* precluded by decision) might seem to have been authorised by those cases in which it has been held, that, where an estate is devised over in the event of the prior devisee, a supposed infant en ventre sa mere, dying without issue, or dying under the age of twenty-one years, the devise over will not be defeated by the fact of the object of the prior devise never having come into existence: *Jones* v. *Westcomb*, Pre. Ch. 316; *Andrews* v. *Fulham*, 2 Str. 1092; *Gulliver* v. *Wicket*, 1 Wils. 105; *Statham* v. *Bell*, Cowp. 40; *Fonnereau* v. *Fonnereau*, 3 Atk. 313; *Meadows* v. *Parry*, 1 Ves. & Bea. 124. By the same kind of implication, a bequest over, in case of a person having *but one* child, has been extended to the event of her having *no* child: *Murray* v. *Jones*, 2 Ves. & Bea. 313.

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but the Court of Common Pleas certified that the children living at the death of the survivor took "equitable estates in fee:" *Farmer* v. *Francis*, 9 Moore, 310, 3 Bing. 151. See also *Murray* v. *Addenbrook*, 4 Russ. 407.

Gifts to the children of unborn persons void, unless restrained.

It remains to notice those cases in which a gift to unborn persons is void for remoteness, on account of the possibility of their not coming into existence within a life in being and twenty-one years afterwards; as where property is given to the children of an unborn person, which, if unrestrained by the context, is necessarily bad on this ground. A gift to the children of a living person cannot (unless the vesting is postponed beyond majority) transgress the rule, because such children necessarily come into existence during the life of the parent; hence, a gift by a testator to the children of his own children is valid, because his own children must be born in his lifetime, and therefore it is in effect, though not in terms, a gift to the children of persons in esse; while, on the other hand, a gift to the grandchildren of any other person, not restrained to the progeny of such children of that person as shall be born in the lifetime of the testator or of some other existing person, will be void.

As to provision for grandchildren.

Whether property can be given to unborn persons for life.

Testators frequently attempt to give property to unborn persons for life, with remainder to their issue. Such limitations are clearly bad, so far, at least, as respects the issue of the unborn persons; but there seems to be no reason, upon principle, for invalidating the gift to the legatees for life; for, as the testator might have given absolute interests to such persons, why may he not give partial interests to the same persons? since the remoteness consists not in the nature of the interest attempted to be given, but in the nature of the objects, namely, the issue of unborn persons, which, not necessarily coming into existence within a life in being and twenty-one years, are clearly too remote. Thus, if a testator devise lands to his son A. for life, with remainder to the children of A. for life, with remainder to the children of such children in fee, the last limitation would unquestionably be void; but it is conceived that the prior devises to the testator's son and his children would be valid, and the reversion in fee subject to those devises, and that only, would descend to the testator's heir-at-law, as real estate undisposed of. So, if personal estate were bequeathed in a similar manner, the gifts to A. and his children successively for life would be good, and the ulterior interest, and that only, would devolve to the next of kin.

Devise to unborn person for life held to be valid.

The case of *Cotton* v. *Heath*, 1 Roll. Ab. 612, pl. 3, seems to be a direct authority for this doctrine. A testator bequeathed a term for years to his wife for eighteen years, and then to B. his eldest son

for life, and then to the eldest issue male of the son *for life*. Although B. had no issue male at the time of the devise and of the death of the testator, it was said, that, *if he had issue male before his (the son's) death, such issue should take by way of executory devise.* RULE AGAINST PERPETUITIES.

A different rule, however, seems to have prevailed in the case of *Hayes* v. *Hayes*, 4 Russ. 311, where a testatrix bequeathed to her seven children a life-interest in 5000*l.* 3*l.* per cent. Annuities, with benefit of survivorship, and declared, that, after the decease of the whole, then that their children should succeed severally to the annuity of their deceased parent, and after the decease of her seven children's children, to her own lawful heirs. Sir J. Leach, M. R., held that all the bequests posterior to the life-interest of the seven children were void. His Honor observed—"The true effect of this will is a limitation to the seven children for life, with remainder to their children, whether born or unborn at the death of the testatrix, for their lives, with a contingent remainder over to persons who shall answer a particular description at the death of the surviving grandchild. This is plainly too remote. You cannot limit to an unborn person for life, unless the remainder vests in interest at the same time. The gift to the children of the children is therefore void, and the seven children who take life-interests under the will, being the next of kin, are entitled to the remainder as undisposed of." Bequest to unborn persons for life held to be void.

This decision, in vacating the bequest to the children's children, as well as the ulterior gift, agrees with the position advanced by the learned Judge who pronounced it, in the previous case of *Lord Deerhurst* v. *Duke of St. Alban's*, 5 Madd. 278 (*a*); but is clearly inconsistent with the case of *Cotton* v. *Heath*, already cited, and contradicts the generally received opinions on the subject, including that of Mr. Fearne, who, in his well-known Essay, treats the validity of a gift for life to an unborn person as a point rather to be taken for granted than discussed, (see Cont. Rem. 503); and of Lord Alvanley, who, in *Routledge* v. *Dorril*, 2 Ves. jun. 366, observed—"A question might arise, *how far an unborn child is to be made tenant for life;* but it is established upon good principles in precedent certainly, *that that may be.* The doubt was, whether it was not tying up the estate beyond lives in being and twenty-one years afterwards, but that is not so *where the absolute interest is disposed of and vested*, though part is given for life, for that person, with the person having the absolute interest, may dispose of the estate. It is not in- Remarks on *Hayes* v. *Hayes*. Opinions of Mr. Fearne and Lord Alvanley in favour of the validity of such a gift.

(*a*) But, as in this instance the unborn person took an absolute interest by the rules of construction, the point did not arise.

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alienable." Indeed, the doctrine here contended for is impliedly admitted by the present Master of the Rolls himself, in his observation in *Hayes* v. *Hayes*, that you cannot limit to an unborn person, unless *the remainder vests in interest at the same time:* so that all are agreed on the general principle, and the only question is, as to the propriety of its nonapplication to that case. It is certainly difficult to discover why the gift of life interests to unborn persons should be vacated, because the testator has attempted to limit over the ulterior interest to unascertained objects. The excessive suspension of the vesting is effectually prevented by vacating such contingent ulterior gift, by which means the interest comprised in it would, immediately on the testator's decease, devolve to the next of kin, the effect being precisely the same as if the testator had (as in *Cotton* v. *Heath*) stopped with the bequest for life. [See also 1 Eden, 409, n. (*b*).]

[In his Treatise on Wills, Vol. I. p. 241, Mr. Jarman has observed, that as a gift for life to an unborn person is valid, so, it is clear, is *a remainder expectant on such gift, provided it be made to take effect in favour of persons who are competent objects of gift.* It is the more necessary to mention this, as, in Mr. Lewis's work on the Law of Perpetuity, p. 421, n. (*d*), Mr. Jarman is cited as having affirmed the contrary. It has been said, that Sir J. Leach was dissatisfied with his own decision in *Hayes* v. *Hayes* (see 1 Coll. 37); and the decision itself is contrary to the authority of *Beard* v. *Westcott*, 5 Taunt. 393, 5 Barn. & Ald. 801, and has been overruled in *Ashley* v. *Ashley*, 6 Sim. 358. See *Boughton* v. *James*, 1 Coll. 26; *Cooke* v. *Bowler*, 2 Keen, 54.]

Effect of a precedent life interest in restraining gifts to grandchildren, &c.

Although a limitation to the children of an unborn person, which is preceded by a life interest to such unborn person, is void, there being nothing to confine the ulterior gift to objects who come in esse during a life in being; yet, if the precedent life interest were given to a person in esse, the ulterior gift would be valid, because, by the established rules of construction, it would comprehend only the objects living at the testator's death, and subsequently coming in esse during the life of the tenant for life, and he being a person in existence at the death of the testator, the gift in question is necessarily restrained within due limits. Thus, if real or personal estate were devised or bequeathed to, or in trust for, A. for life, and after his decease to be divided among his grandchildren, their heirs, executors, or administrators, such of the grandchildren as were living at the death of the testator, and those who afterwards were born during the life of A., would be entitled, to the exclusion of grandchildren subsequently coming into existence; (vide post, Sect. 14,

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pl. 3); and consequently the gift to the grandchildren would be valid. But if no object should happen to come into existence previously to the determination of the prior life interest, i. e. if A. should die leaving children, but without having had any grandchild, since the effect of this circumstance would be to let in the whole range of grandchildren (if any) subsequently born, (vide post, Sect. 14, pl. 3), (as it necessarily does from the absence of any data or principle for drawing an intermediate line), the gift would be void for remoteness.

Distinction as to remainders.

The rule just laid down is equally applicable to real and personal estate, except that if the devise to the grandchildren were a legal remainder, and at the death of A. there was no object capable of taking, then the limitation to such grandchildren would fail under the rule before noticed, requiring that a contingent remainder should vest at the instant of the determination of the particular estate on which it is dependent. In this instance, therefore, the same result is arrived at through different means.

Immediate gift, how far dependent for its validity on the event.

Where a gift of real and personal estate to grandchildren is not preceded by any life estate, it would be valid or not, according to the event of there being, or not being, an object living at the death of the testator, since upon this fact depends the alternative whether the gift is confined to objects then living, or includes all after-born grandchildren. Thus, if lands were devised to the grandchildren of A. in fee, and A. had a grandchild living at the testator's decease, such grandchild would take the whole, to the exclusion of after-born grandchildren; but, if there was no grandchild living at the testator's decease, it would extend to the whole line of after-born grandchildren. In the former case, therefore, it would, and in the latter it would not, be valid. (Vide post, Sect. 14, pl. 3).

Effect of the words "to be born," &c.

But if the gift were to grandchildren "*to be born*," or "*to be begotten*," these additional words would have the effect of letting in after-born objects, even though there was a grandchild living at the death of the testator; and, therefore, independently of that event, the gift would be too remote: *Mogg* v. *Mogg*, 1 Mer. 654.

Clause empowering trustees to protract the absolute ownership, void.

As the law does not permit to be done indirectly what cannot be done directly, the rule which forbids the limitation of real or personal estate to an unborn person for life, with remainder (*a*) to his issue, equally invalidates a clause in a settlement or will, empowering trustees, on the birth of tenants in tail, to revoke the uses and limit estates for life to such objects, who could not, by the rule under discussion, have been made tenants for life: *Duke of Marlborough* v.

(*a*) It is almost impossible, in stating limitations of personalty, to avoid using this expression, though strictly applicable only to real estate.

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Earl of Godolphin, 1 Eden, 404. The author of this futile expedient to evade the rule against perpetuities, was the celebrated John Churchill, the first Duke of Marlborough, anxious, it should seem, to transmit to his posterity (in addition to what the public generosity or gratitude had inalienably fixed in his descendants) an estate that should be no less enduring than the fame which he had won on the fields of Ramilies and Blenheim: but this great soldier, and perhaps still greater statesman, proved to be an unequal match for the sturdy rule of law.

Appointee must be competent to have taken immediately from the donor of the power.

And here it may be observed, that, in the case of appointments, testamentary or otherwise, in pursuance of powers of selection or distribution among defined classes of objects, the appointees must be persons competent to have taken immediately under the deed or will creating the power as they are *in* under that deed: *Crompe* v. *Barrow*, 4 Ves. 681; *Robinson* v. *Hardcastle*, 2 T. R. 240, 380, 781. [The power must be read as inserted in the deed or will creating it.] Attention is often called to this doctrine in practice; for it frequently occurs, that a power having been reserved by a settlement to one or both of the marrying parties, to appoint an estate or fund among the issue generally of the marriage, the donee (*a*) wishes to exercise it by making a settlement of the property on the children of the marriage for life, with remainder to their children or issue; this, it is obvious, cannot be done; for, as the grandchildren of the marrying persons could not have been made objects of gift immediately under the limitations of the settlement, since they do not (as in the instance of children) necessarily come in esse during the lives of any of the parties then in being, they cannot take under the appointment founded on such settlement: *Bristowe* v. *Ward*, 2 Ves. jun. 336; *Crompe* v. *Barrow*, 4 Id. 681. See also *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781. In order to bring the appointment within the prescribed limits, it must be confined to such issue as shall be born in the lifetime of the marrying parties or one of them, or of some other person living at the time of the execution of the settlement, and during the period (as the case of *Cadell* v. *Palmer* now allows us to say) of twenty-one years afterwards, unless the vesting is postponed (as it commonly is) to majority, which would absorb the twenty-one years; and even in regard to the children of the marriage, the vesting of the shares must not be postponed beyond the decease of the surviving parent and the attainment of majority. [See suggestions as to settlement of shares appointed under power of selection, 1 Jarm. Wills, 248, n. (*b*).]

(*a*) Vide ante, Vol. 9, p. 138, (1st ed.)

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Where a power authorises an appointment to issue only who are born within the prescribed limit, an appointment to a more extensive range of issue would be good pro tanto, though made to them as a class; for, as the issue who are beyond the line are also strangers to the power, the instrument would be simply nugatory as to the shares expressed to be appointed to them. So, in the converse case, viz. that of the power embracing issue generally, and the appointment being confined to issue within the line, there can be no doubt (assuming that the power authorises an exclusive appointment to such objects) that the appointment would be good. But if the power and appointment *both* embrace too wide a range of objects (the appointment being made to them as a class), the appointment will be void in toto, as well as to members of the class who are within, as to those who are not within the line: *Routledge* v. *Dorril*, 2 Ves. jun. 357.

Effect of power and appointment, or one of them, embracing too wide a range of objects.

[It has now been decided in several cases, that a power of sale introduced into a deed or will containing limitations in strict settlement, and which is not in terms restricted in its exercise to the period allowed by law, is valid. See 1 Jarm. Wills, 250.]

It is clear, that, in order to render a gift to a class of persons valid, the class will not be narrowed to a more limited range of objects than the gift, according to the general rules of construction, would comprise; for though it is highly probable in such cases that the testator, if asked, would have preferred to cut down his bequest, in order to bring it within valid limits, yet, as he has intimated no such intention, a Judge is not warranted in acting upon such an hypothesis. Thus, where a testatrix by her will bequeathed certain stock to her children respectively for life, and after their decease to their children; and, by a codicil, directed that her grandchildren's shares should be settled on them for their lives, and afterwards to revert to their children lawfully begotten: the testatrix had grandchildren born in her lifetime; and it was contended, that the bequest might be confined to them, as the testatrix had spoken of grandchildren generally, and had in another part of her will made a bequest in favour of a grandchild living at her death; but Sir J. Leach, M. R., held, that, as the grandchildren would include every child which the testatrix's children might at any time thereafter have, the limitation to the children of such grandchildren was void. *His Honor treated the codicil as a nullity, holding the bequest to take effect according to the will as originally framed: Arnold* v. *Congreve*, 1 Russ. & Mylne, 209. [And see other cases on this point, 1 Jarm. Wills, 254—260.]

Construction not strained in order to bring a gift within legal limits.

It must be confessed, however, that the doctrine which teaches

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that the rules of construction are to be unsparingly applied, without regard to their effect in rendering devises valid or invalid, has not invariably been adhered to. An instance of its abandonment occurs in the case of *Mogg* v. *Mogg*, 1 Mer. 654, where real estate was devised to A. and B. in trust to pay the rents to the children, begotten and to be begotten, of Sarah Mogg, during his, her, and their life and lives; and after the decease of such children, the testator devised the estate to the lawful issue of such child or children, and his, her, or their heirs, as tenants in common. It was contended, that, as the estate pur autre vie included all the children living at *or born after* the death of the testator, the devise to their issue as purchasers was void in toto, as embracing all the issue coming into existence during that estate; and such, by the general rule, would clearly have been its construction. The Court of King's Bench, however, on a case from Chancery, certified that the issue of such of Mrs. Mogg's children *as were born prior to the testator's decease*, took an interest as tenants in common in fee-simple, expectant upon the determination of the estate to the trustees; but that none of the issue of such of Mrs. Mogg's children as were born after the testator's decease took any interest. This certificate was afterwards confirmed by Sir William Grant, M. R.

Case of *Mogg* v. *Mogg*.

Observations on the case.

By what authorities or process of reasoning the Court felt itself warranted to draw this line between children living at the testator's death and those born afterwards, we are not informed, the certificate being, according to the present practice (*a*), silent as to the grounds of the opinion expressed in it. The construction certainly was not authorised by the cy pres doctrine; for, though this doctrine takes great liberty in moulding a testator's disposition, in order to bring it within legal limits, yet it proceeds upon a principle which does not apply to such a case as *Mogg* v. *Mogg*, as will appear from the following statement, and examples of it. [See some further observations by Mr. Jarman on the case of *Mogg* v. *Mogg*, 2 Jarm. Wills, 341, n. (*t*).]

Doctrine of approximation, or cy pres.

The doctrine of approximation, or cy pres as it is called, is that which obtains in certain cases where lands are limited to an unborn

(*a*) [In the course of the argument in the case of *Tollemache* v. *Earl of Coventry* in the House of Lords (8 Bligh, N. S., 561,) the Lord Chancellor observed, that "the Judges had discontinued giving reasons in their certificates upon issues out of Chancery; because Lord Thurlow had questioned the validity of their reasons in some case; but he conceived that the House might require a Judge to give the reasons for his judgment; and that the Judges had now agreed to give reasons in their certificates upon issues out of the Court of Chancery."]

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person for life, with remainder to his first and other sons successively in tail. As such limitations are clearly incapable of taking effect, the remainder to the issue being absolutely void, the doctrine, in order to prevent the total frustration of the intention in favour of the issue, gives to the parent the estate tail, which was designed for the issue; under which estate tail, unless barred by some act on the part of the parent, the lands will descend to the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue is considered as paramount to that which regulates the manner of their taking, and the latter is therefore sacrificed. The first unexceptionable (*a*) authority for the doctrine is the case of *Nicholl* v. *Nicholl*, 2 Bl. 1759, where the devise was "to the second son of W. Nicholl (*who at the death of the testator had no son*) *for his life*, and after his death, or in case he should inherit the paternal estate by the death of his brother, to *his second son* lawfully to be begotten *and his heirs male*, remainder to the third and other sons of W. Nicholl successively in tail male, remainder over." The Court of Common Pleas, on a case sent from Chancery, certified that the estate would vest in the second son by executory devise; and in order to effectuate the general intention of the testator, he would take *an estate in tail male*, determinable on the accession of the paternal estate. [See the observations of Rolfe, B., on this case, 16 Mee. & W. 434.]

Unborn tenant for life made tenant in tail under the cy pres doctrine.

So, in *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781, where, on the marriage of A. and B., lands were limited to A. for life, remainder to such of the children of the marriage as A. should appoint, and in default, over; A. by will appointed to his son for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of such son successively in tail male,

(*a*) The case of *Humbertson* v. *Humbertson*, 1 P. W. 332, has usually been considered as a leading authority for the doctrine. A testator directed trustees to convey lands to M. H. for life, and then to his first son for life, and so to the first son of that first son for life, &c. This trust was executed by a strict settlement, making the sons born before the death of the testator tenants for life, and those born afterwards tenants in tail. The trust, however, being executory, the Court was authorised to mould the limitations so as to bring them within the established limits, independently of the doctrine in question. The case of *Chapman* d. *Oliver* v. *Brown*, 3 Burr. 1626 (*S. C.*, in Dom. Proc. 3 B. C. C. Toml. ed. 269), cited by Mr. Butler, Butl. Fea. C. R. 207, n., is also distinguishable, (though the doctrine underwent discussion), as there was an express devise in tail to the unborn son, the only question being, whether words ought not to be supplied which would have given the estate tail to the son of such son, and thereby rendered the devise void. This was refused, and, consequently, the devise was held to be good.

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with remainder to his daughters as tenants in common in tail. Mr. Justice Buller expressed an opinion that the son, by the application of the cy pres doctrine, took an estate tail; but the Court was not called upon to decide the point. See also *Hopkins* v. *Hopkins*, Cas. temp. Talb. 44, 1 Atk. 580, Co. Litt. 271. b. Butl. n., S. C.

Case of *Pitt* v. *Jackson*.

The case which has carried this doctrine the greatest length is *Pitt* v. *Jackson*, 2 B. C. C. 51, cited 2 Ves. jun. 349; which was as follows:—On the marriage of Pinckney Wilkinson, certain monies to be paid by him were directed to be laid out in the purchase of lands, to be settled to the use of P. W. for life, without impeachment of waste, with remainder to his intended wife for life, remainder to the use of the children of the marriage in tail, subject to such powers, limitations, and provisoes as P. W. by deed or will should appoint, with remainders over. By will he bequeathed certain sums of money in trust to be laid out in real estate, to be conveyed in trust for his daughter Mary, during her life, for her separate use, remainder to trustees to support contingent remainders, remainder *to all and every the child and children of his said daughter*, with remainders over. Sir Lloyd Kenyon, M.R., declared the appointment to be invalid, and that the whole of the share appointed to the daughter for her separate use was, to effectuate the testator's general intention, to be considered to vest in her an estate tail.

Remarks on the case of *Pitt* v. *Jackson*.

This case went beyond the preceding decisions, because the manner in which the children were intended to have taken the estate under the appointment differed more considerably from the mode of its devolution under an estate tail, which this doctrine gave to their parent. In those cases, the first and other sons were to take successively; *here*, all the children, female as well as male, were to take concurrently. Probably, the authority of *Pitt* v. *Jackson* is not to be implicitly relied on; even the eminent Judge who decided it, on a subsequent occasion (1 East, 451), admitted that the case went to the outside of the rules of construction: adding, however, that still he did not think it was wrong. Lord Eldon, in quoting this observation (7 Ves. 390), intimated that it was not proper to go one step farther; for those cases, in order to serve the general intent and the particular intent, destroyed both. [See the elaborate judgment of Rolfe, B., in *Monypenny* v. *Dering*, 16 Mee. & W. 418.]

Limitations imposed on the cy pres doctrine.

It has since been decided, in relation to the doctrine in question, 1*st*, That it does not apply to limitations of personal estate: *Routledge* v. *Dorril*, 2 Ves. jun. 365. 2*ndly*, That it is inapplicable where an attempt is simply made to limit a succession of life estates to the issue of an unborn person, either for a definite or indefinite

series of generations: *Somerville* v. *Lethbridge*, 6 T. R. 213; *Seaward* v. *Willock*, 5 East, 198; *Beard* v. *Westcott*, 5 Taunt. 393; 5 Barn. & Ald. 801; Turn. & Russ. 25. And 3*rdly*, That the doctrine is not applicable where the limitation to the children of the unborn person gives them an estate in fee-simple. The last point was decided in the case of *Bristowe* v. *Warde*, 2 Ves. jun. 136, where money directed to be laid out in lands was, by the trusts of certain articles, and a settlement executed in pursuance of those articles, made subject to a power of appointment by the husband in favour of the children of the marriage; and he appointed portions of the fund to certain of the children for life, and after their decease among their children, as they should appoint. It was held to be real estate, and that the husband's appointment, which would have the effect of vesting absolute interests in the children of the children, in default of appointment by those children, was void as to them, and could not, Lord Loughborough was of opinion, be executed cy pres (*a*). [As to the doctrine of cy pres, see also 2 Sugd. Pow. 60, and Fearne, C. R., by Butl., 208.]

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3. *Restraint on the Accumulation of Income.*

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Restraint on the accumulation of the rents and profits of lands was unknown to the common law, except so far as it was involved in the doctrine which prohibited the giving an estate for life to an unborn person, with remainder to his issue. The rule against perpetuities necessarily prevented accumulation from being carried beyond its limits, though, in the early discussions of the rule, no allusion is made to it, probably because for a long period trusts directing the accretion of income were of rare occurreuce, so that little or no inconvenience was experienced from the allowance of so wide a range of accumulation. The late Mr. Thellusson was the first who, by the capricious and extensive exercise of the power which this rule placed in his hands, shewed the necessity of further restraint. The validity of this gentleman's will, which suspended the absolute ownership, and postponed the usufructuary enjoyment of the bulk of his estate until the expiration of nine lives in being at the time of the testator's death, was established, after many hard struggles, occasioned rather by the immense value of the property implicated (computed to amount, with the accumulations, to upwards

Accumulation of income, how restrained.

(*a*) According to the report in Brown, they were tenants for life only; but this seems to be inaccurate.

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of 18,000,000*l.*), than by any real difficulty in the principle; for, by confining the restriction to existing lives, the testator had, with a prudent foresight worthy of a better purpose, escaped the question since agitated respecting the allowance of an absolute term in addition to a life (*a*). [4 Ves. 227; 11 Ves. 112.]

Stat. 40 Geo. 3, c. 98.

This case was soon succeeded by the passing of the stat. 40 Geo. 3, c. 98, by which, after reciting that it was "expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions" thereinafter contained, it is enacted, "that no person or persons shall, after the passing of this act, by any deed or deeds, surrender or surrenders, *will, codicil, or otherwise soever*, settle or dispose of any *real or personal property*, so and in such manner that the *rents, issues, profits, or produce* thereof, shall be wholly or partially *accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors*, OR *the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator*, OR *during the minority or respective minorities of any person or persons who shall be living, or in ventre sa mere, at the time of the death of such grantor, devisor, or testator*, OR *during the minority or respective minorities only of any person or persons*, who, under the uses or trusts of the deed, surrender, will, or other assurances directing such accumulations, *would* for the time being, if of full age, *be entitled* unto the rents, issues, and profits, or the interest, dividends, or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void; and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." Sect. 2 provides, "That nothing in this act contained shall extend to any provision *for payment of debts* of any grantor, settlor, or devisor, or other person or persons, or to any provision for *raising portions for any child or children* of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise, or to any direction *touching the produce of timber*

No person to settle or dispose of property so as to accumulate the income longer than for the life of the settlor and twenty-one years, or certain minorities.

Act not to extend to provisions for payment of debts, or for raising portions for children in certain cases.

(*a*) An act has been passed for the regulation of the Thellusson property. [3 & 4 Will. 4, c. xxvii.]

or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this act had not passed." Sect. 3 declares that the act shall not extend to dispositions of *heritable property* in Scotland.

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—nor to directions touching the produce of timber,

—nor to heritable property in Scotland.

Mr. Preston (2 Treatise on Abstracts, p. 181) has advanced an opinion, that a testator or settlor may take each of the periods of accumulation mentioned in the statute; for instance, that he might accumulate income for a term of twenty-one years, and also for the minority of any person entitled under the limitations (*a*). The language of the statute, however, is disjunctive, conferring, therefore, it should seem, the option of selecting one only of the designated periods; and such we may collect from the judgment in the case of *Griffiths* v. *Vere*, 9 Ves. 136, to be the opinion of Lord Eldon, who there takes some pains to shew, that, under certain circumstances, the combined effect of an express trust for accumulation for twenty-one years, and of the rule of law which accumulates the income of a minor, might be to protract accumulation for forty years, thereby evidently indicating that his Lordship did not consider the statute directly to authorise accumulation to that extent. Indeed, the point could scarcely arise in regard to a will, because the minority of a person in esse at the death of the testator would necessarily be comprised in the term of twenty-one years, expressly given by the statute; and the clause allowing accumulation during the minority of any of the persons entitled under the uses or trusts, has been decided *not to authorise a positive trust for accumulation extending over the minority of an unborn person, to whom, at majority, the accumulated fund and the principal from which it arose, are given.* Thus, in the case of *Haley* v. *Bannister*, 4 Madd. 275, the testator had directed certain sums of stock in the public funds to be purchased by his executors, and the dividends accumulated, until one of the children of his daughter, born or *to be born*, should attain the age of twenty-one, when the whole was to be transferred to such child and any other child or children who might be then living; the will contained a residuary clause. Sir J. Leach, V. C., said—"The statute prevents an accumulation of interest during the minority of an unborn child; but, as to the principal, the law remains as before the statute. The excess of accumulation, prohibited by the statute, would form part of the residue." This decision reduces the clause of the act, which allows accumulation during the minority of any person, who, if of age, would be entitled to the income, to a

Whether the act allows accumulation for all the specified periods cumulatively.

Construction of clause respecting minority of persons entitled under the limitations.

(*a*) [See also Hargrave on the Thellusson Act, p. 139.]

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mere saving or reservation of the rule of law which so disposes of the income of minors, or rather of their surplus income, after providing for maintenance. It limits the term of accumulation authorised by the act to twenty-one years from the testator's decease, or the minority of a person then in esse, which, in fact, is included in the former, since every person born before the death of the testator must necessarily attain majority before the expiration of twenty-one years computed from that period. The decision, therefore, seems to place in some peril the accumulating trusts ordinarily introduced into provisions for the maintenance of minors, being persons unborn at the testator's decease, which direct the unapplied surplus income from time to time to be added to the principal. Such trusts, however, are distinguishable from the bequest in *Haley* v. *Bannister* in this, that they extend only to the unapplied surplus and not to the entire income, and therefore approach more closely to the principle of the rule of law which accumulates the income of minors after providing for maintenance, though they differ from that rule in regard to the ultimate destination of the accumulated fund which the law gives to the minor himself, but which the express trust commonly annexes to the principal fund; though even this difference is considerably narrowed where the trustees (as they frequently do, and always ought to) possess a power of applying the accumulated fund at any subsequent period of minority (*a*), which clause would certainly afford a strong argument for taking the trusts in question out of the vacating principle of the case of *Haley* v. *Bannister;* indeed, considering the extreme inconvenience of holding them to be invalid, it is probable that the Courts would not come to that conclusion unless they felt themselves to be irresistibly impelled to it by authority (*b*). Where the minor, whose income is accumulated, is the child of a prior legatee for life of the same property, (which is a common case), the point to which the preceding observations have been directed does not arise, as the accumulation is then authorised by the proviso applicable to children's portions.

As to accumulation directed by maintenance clauses.

Excessive accumulating trust good pro tanto.

An important and well-settled doctrine in the construction of the statute is, that a trust for accumulation, reaching beyond the allowed period, is good pro tanto. Thus, where a testator directed that the profits of certain canal shares should be invested, the interest arising to be applied to the education of the children of A. and B., (*who had no children at the death of the testator*), and, on their attaining

(*a*) Vide ante, Vol. 9, p. 129, 1st ed.

(*b*) [See Mr. Hargrave's observations on this opinion of Mr. Jarman—Hargrave on the Thellusson Act, pp. 135, 136.]

twenty-one, the whole to be divided among them; Sir W. Grant, M. R., held, that the accumulation was good for twenty-one years from the death of the testator: *Longdon* v. *Simson*, 12 Ves. 295. See also *Palmer* v. *Holford*, 4 Russ. 403.

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The same point had been previously decided in the case of *Griffiths* v. *Vere*, 9 Ves. 127, which also elicited from Lord Eldon some general observations respecting the destination of the income which is released from accumulation by the act. The testatrix bequeathed the residue of her property to E. M. G. and M. W. during their joint lives, in equal proportions, and after the decease of either, to the survivor; but she declared that so much of the interest as should accrue to E. M. G. *during the life of* J. G., her husband, *should be accumulated* with the capital, and, upon his decease, the capital and accumulation paid to E. M. G.; and if she should then be dead, to another person: Sir W. Grant, M. R., dismissed a petition of E. M. G. and her husband, claiming the benefit of the will, as if this clause of accumulation, which was alleged to be void, had not been inserted; and this dismissal was confirmed by Lord Eldon, on the ground that a trust for accumulation during a life *is good for the period of twenty-one years of that life.* His Lordship expressed some doubts whether, if the accumulation were void, the gift to the wife would operate as a bequest in præsenti; the whole must, he said, be taken together. On the general question as to the *destination* of income, the accumulation of which was rendered void by the act, his Lordship observed, that "the object of those who introduced the statute, and the idea of all, was, that, in general, if not in all cases, those rents and profits would have gone, not to persons claiming by disposition, but, by the effect of the act, striking out of the will the direction for accumulation, to those entitled by intestacy; for, if literally pursued, the testator might give his estate to a person not to take till the expiration of twenty-one years after a life in being; and if he said nothing about accumulation, the rents and profits would be undisposed of: if he directed what the act authorises him to direct, that, for the first twenty-one years after his death there should be accumulation, at the end of that time there might be a very long period during which the rents and profits would go to no one by the disposition; but, in the case of real estate, would belong to the heir, and in case of personal estate, unless there was an express disposition of what was not before disposed of, to the next of kin."

Destination of income, the accumulation of which is void under the statute.

["His Lordship," observes Mr. Jarman, (1 Treat. on Wills, 270), "evidently considered that the effect of the statute, by vacating the

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accumulating trust, was not to accelerate the title of those to whom the property was given at its termination, but to produce an intestacy pro tanto, (the bequest being of a residue), thereby letting in the next of kin." "And, in consistency with this notion," continues Mr. Jarman (Ib.), "subsequent cases seem to establish the following position:—That, where the property is in the first instance actually disposed of in terms which would, if the testator had proceeded no further, have entitled the devisee or legatee to the immediate income, and the testator then proceeds to engraft on such disposition an accumulating trust, which is wholly or partially void, on account of its taking too wide a range, the statute, by discharging the property from the superadded trust, has the effect of entitling the devisee or legatee to the immediate income, in the same manner as if the prior gift had stood alone. As in the case of *Trickey* v. *Trickey*, 3 Myl. & K. 560, where a testator bequeathed the residue of his personal estate in trust for his daughter during her life, and, after her decease, in trust to pay or transfer the principal unto all the children of his said daughter, when they should attain twenty-one, with provision for maintenance in the meantime; and the testator then added a proviso, that if the dividends of his residuary estate should exceed 200*l*., the surplus should *accumulate* for the benefit of the children of his daughter. The testator's daughter survived him twenty-six years, during twenty-one of which the direction to accumulate the income of course was good; and, with respect to its destination during the remaining five years, Sir J. Leach, M. R., held, that the surplus beyond the 200*l*. belonged to the daughter, she being the person *who would have been entitled, if such accumulation had not been directed.*"]

[As to the effect where the gift is ulterior to, and is to take effect at, the expiration of the accumulating trust, see 1 Jarm. Wills, 271 et seq., and the cases there cited.]

Accumulation arising from nature of gift, and not from express direction.

No reported case (*a*) has occurred illustrating the application of the statute to gifts, in which the accumulation has resulted, not from an express direction to accumulate, but from the vesting, both of the corpus and the income, being postponed until a future period, exceeding twenty-one years in duration; as, if a testator should bequeath the residue of his personal estate to the first son of A. born after his (the testator's) decease, who should attain the age of twenty-one years.

(*a*) [The case of *Shaw* v. *Rhodes*, 1 Myl. & Cr. 135, seems to have established the application of the act to all implied as well as express directions for accumulation. See 1 Jarm. Wills, 274. See also Hargrave on the Thellusson Act, pp. 77 et seq.]

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This gift would, when it takes effect, according to the established construction of residuary bequests, carry the income accruing before the period of vesting; involving, therefore, an implied trust for accumulation, inevitably extending beyond the statutory term. In such a case, the income accruing after twenty-one years from the testator's decease would unquestionably go to the next of kin. If any specific subject of personal estate were bequeathed in a similar manner, the effect might be different, for the intermediate profits would not accumulate for the specific legatee, but would belong to the residuary legatee, if there was one, (see *Haley* v. *Bannister*, 4 Madd. 275, ante, p. 197), and to the next of kin if there was not. So, if the subject were real estate, the heir-at-law, or the residuary devisee, as the case might be, would be entitled to the immediate income, as an interest in real estate not included in the particular devise. In the two latter instances, there being no accumulation, of course the statute would not be called into operation. But it is to be observed, that, where the entire real and personal estate of a testator are blended in one gift, the vesting of which is postponed to a future period, the immediate income arising as well from the real as from the personal estate, follows the destination of the corpus of the property, according to the rule applicable to residuary bequests; the presumption being, that the testator had the same intention as to *both*; *Gibson* v. *Lord Montfort*, 1 Ves. sen. 485; *Chambers* v. *Brailsford*, 18 Ves. 368; *Glanvill* v. *Glanvill*, 2 Mer. 38; *Genery* v. *Fitzgerald*, Jac. 468; so that the case is governed by the rule first laid down. After the expiration of twenty-one years from the testator's decease, until the vesting, therefore, the income of the real estate would go to the heir, and the income of the personalty to the next of kin. And the same principle would regulate the destination of the accumulated fund itself, if the contingent gift, which was to carry it, failed in event; i. e. that portion of the fund which resulted from real estate would belong to the heir, and that portion of it which proceeded from personalty to the next of kin: *Chambers* v. *Brailsford*, 18 Ves. 368. See also *Roberts* v. *Walker*, 1 Russ. & Mylne, 752.

Destination of the immediate income in certain cases of future specific and residuary gifts.

It is to be observed, that the statute does not allow of accumulation for twenty-one years whenever commencing, but requires that it should be comprised within the term of twenty-one years computed from the testator's death. Thus, if an accumulating trust were made to arise on a contingency, which did not happen until nineteen years after the testator's decease, the trust would be determined by the statute at the expiration of the twenty-one years, though it had

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run only two years; and by parity of reason, if the contingency did not occur until twenty-one years after the testator's decease, the trust would be void in toto.

As to the heir taking by devise.

In addition to the restrictions on the testamentary power already noticed, there existed, until very recently, the restraint arising from the doctrine which precluded a testator from vesting in his heir an estate in fee-simple by purchase. By the effect of this doctrine, if a testator devised lands of inheritance to his heir-apparent and his heirs, the devise was inoperative, and the heir took the fee by descent as his elder or paramount title; but the law on this subject has been completely altered by the late act of 3 & 4 Will. 4, c. 106, s. 3, stated ante, Vol. I. pp. 141, 145, which declares, that, where land is devised to the heir, he shall be considered to have acquired it as a devisee and not by descent. This enactment will not have the effect of varying any of the testamentary forms in use; its merit is, that it gets rid of a doctrine which has given rise to much litigation, and still presented some unadjudicated points.

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VII. Lapse—Failure of particular gifts.—Operation of residuary clauses.—Beneficial interest.—Constructive conversion.—Words of recommendation, etc.

1. *Doctrine of Lapse.*

Doctrine of lapse, what.

The liability of devises and bequests to failure from the decease of the object in the testator's lifetime, is a necessary consequence of the ambulatory nature of wills; which, as they do not take effect until the death of the testator, can communicate no benefit to persons who previously die, in like manner as a deed cannot operate in favour of those who are dead at the time of its execution. The doctrine applies indiscriminately to gifts with and without words of limitation.

Applied to devises in tail and in fee.

Thus, if a devise be made to A. and his heirs, or to A. and the heirs of his body, and A. dies in the lifetime of the testator, the devise absolutely lapses, and the heir, special or general, of A., takes no interest in the property, he being merely included in the words of limitation, i. e. in the terms which are used to mark the quantity or duration of the estate to be taken by the ancestor, through whom alone any title could flow to such heir: *Brett* v. *Rigden*, Plow. 345; *Fuller* v. *Fuller*, Cro. El. 422; *Wynn* v. *Wynn*, 3 B. P. C. Toml. ed. 95. See also *Goodright* v. *Wright*, 1 P. W. 397; *Ambrose* v. *Hodgson*, 3 B. P. C. Toml. ed. 416.

—To bequests of personalty.

Bequests of personal property of course are subject to the same

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principle; and it is observable, that, in applying it to them, a legacy to one and his executors or administrators, is construed simply as an absolute gift; *Elliott* v. *Davenport*, 1 P. W. 83 (*a*); the circumstance, that, in the instance of personal estate, words of limitation are not requisite to carry the absolute interest, not having been considered sufficient to denote an intention to make the executors or administrators substituted and independent objects of gift: [*Shuttleworth* v. *Greaves*, 4 Myl. & Cr. 35.]

Effect of death before the making of the will.

And, where the devisee or legatee happens to be dead when the will is made, the words of limitation are equally inoperative to vest the subject in the representatives of the deceased person: *Maybank* v. *Brooks*, 1 B. C. C. 84.

—Of declaration that gift shall not lapse.

And even a declaration that the devise or bequest shall not lapse, does not per se prevent it from being defeated by the death of the object in the testator's lifetime, since negative words do not amount to a gift; and the only mode of excluding the title of those on whom the law, in the absence of disposition, casts the property, is by giving it to some one else. But, such a declaration accompanying a bequest

(*a*) In this case, the legacy was of a debt, which is liable to lapse equally with gifts in any other form: *Toplis* v. *Baker*, 2 Cox, 118. It is true, that, in *Sibthorpe* v. *Moxton*, 1 Ves. sen. 49; *S.C.*, *nom. Sibthorpe* v. *Moxton*, 3 Atk. 580, Lord Hardwicke held, that the forgiving of a debt, coupled with a general direction to the executor to deliver up the security, (without saying to whom), operated as a release, though the legatee died in the testator's lifetime—his Lordship thinking that the latter words imported that the security should be delivered up, whether the debtor were living or not, and which he considered would, beyond all question, be the effect of the words of direction standing alone; his Lordship admitting, however, that, in regard to the administration of assets, it was to be considered as a legacy. In *Maitland* v. *Adair*, 3 Ves. 231, the words were—"I return A. his bond." A. died in the testator's lifetime, and it was held that the legacy lapsed. This case is overlooked by Mr. Roper (Treat. Leg. 411), who has dwelt more on the merely verbal distinction between the giving and forgiving of a debt, than seems warranted by the principles of the cases. [See the case of *South* v. *Williams*, 12 Sim. 566, where the testator bequeathed the residue of his personal estate in trust for his son and daughter equally, and declared that certain sums which he had lent to his son, should be deducted from his share of the residue; and that certain sums which he had lent to C. W., his daughter's husband, on bonds, should be taken and allowed in account as part of her share; and, if the balance should appear to be against C. W., the trustees were to refrain from putting the bonds in force against him, and to take a security from him for payment of the balance by instalments. The daughter died in the testator's lifetime; and it was held, nevertheless, that C. W. was released from the debts due from him, and was answerable only for the excess (if any) of those debts beyond the amount of a moiety of the residue. And in *Philips* v. *Philips*, 3 Hare, 281, it was, among other things, determined that the shares of the residue attributed to the debts of creditors who died in the lifetime of the testator, did not lapse by their death.]

As to the lapse of legacies forgiving debts.

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to a person *and his executors or administrators*, would be considered as indicating an intention to substitute the executors or administrators for the original legatee: *Sibley* v. *Cook*, 3 Atk. 572.

The insertion of the word "or," between the name of the devisee or legatee and the words of limitation, as in a gift to one *or* his heirs, or to him *or* his executors or administrators *or* personal representatives (*a*), will not vary the construction, the expression being regarded as an inaccurate mode of annexing words of limitation to the gift, and not as designed to create a substitutional gift in the event of the failure of the first by lapse: *Stone* v. *Evans*, 2 Atk. 86; *Wright* v. *Wright*, 1 Ves. sen. 409; *Read* v. *Snell*, 2 Atk. 642; *Corbyn* v. *French*, 4 Ves. 418, 435; *Tidwell* v. *Ariel*, 3 Madd. 403, [where the gift was not to take effect immediately on the testator's death.]

Gifts to persons *or* their heirs, &c.

And where a testator, resident in India, bequeathed a share of his personalty to A., "who resided at L. when I left England, *or* to his heirs, executors, administrators, or assigns for ever," Sir L. Shadwell, V. C., held, that, A. having died in the testator's lifetime, the legacy failed; his Honor being of opinion that the additional words were too uncertain to create a substitutional gift, [and relying especially on the insertion of the words "heirs" and "*assigns*:"] *Waite* v. *Templer*, 2 Sim. 524. [But where there was an immediate gift of personalty to A. "or his heirs," the next of kin were held to be entitled: *Gittings* v. *M'Dermott*, 2 Myl. & K. 69. So, where the gift was to A. or his legal personal representatives: *Cotton* v. *Cotton*, 2 Beav. 69.]

Courts indisposed to construe gifts as substituting representatives.

So strong, indeed, is the indisposition of the Courts, in construing wills, to give to representatives what was designed primarily for, but never vested in the deceased himself, that though, by the general rule, it is clear, that, where a legacy is bequeathed, the payment of which is expressly deferred to a future period, with a gift over in the event of the legatee's dying before the legacy becomes payable, the gift over is construed as applying to death in the lifetime of the testator, as well as to death afterwards; *Walker* v. *Main*, 1 Jac. & Walk. 1; yet, it seems, where the substituted objects of gift are the executors or administrators of the legatee, (and the same principle would seem to apply to any other class of representatives), the construction is different, and they will only be entitled in the event of the

(*a*) But, in *Girdlestone* v. *Doe*, 2 Sim. 225, a bequest of 40*l.* per annum to A. for life, and, after her decease, to B. *or* his heirs, was held not to give B. the absolute interest, but to create a substitutional gift in case of B. dying in the lifetime of A.

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legatee dying in the interval between the death of the testator and the time of payment or distribution: *Bone* v. *Cook*, M'Clel. 168, 11 Price, 332; [*Corbyn* v. *French*, 4 Ves. 418. See *Saunders* v. *Vautier*, Cr. & Ph. 240; *Taylor* v. *Beverley*, 1 Coll. 108.] Nevertheless, if the will supplies no other period to which the words in question can be referred, (as, where the gift is of a pecuniary legacy, payable immediately on the testator's decease), death before the time of payment is, from necessity, construed to mean death in the lifetime of the testator.

Gift to next of kin of a married woman.

And here it may be noticed, that a bequest to the next of kin of a married woman, in the event of her dying in the lifetime of her husband, has received very much the samekind of consideration as a bequest to heirs, or executors and administrators; namely, as being intended merely to modify the interest of the legatee in case of her dying in the lifetime of her husband after having survived the testator, and not to prevent lapse in the event of the legatee dying under similar circumstances in the testator's lifetime. Thus, where a testator bequeathed to trustees 10,000*l*., to be invested in stock, in trust for A., a married woman, during the joint lives of herself and husband, and, in case she survived him, to her absolutely; but, if she did not survive him, to such person as she should by will appoint, and, in default of appointment, to her next of kin, exclusive of her husband: A. died in the lifetime of her husband and the testator; and it was held that the legacy lapsed: *Baker* v. *Hanbury*, 3 Russ. 340 (*a*).

Baker v. *Hanbury* overruled by *Edwards* v. *Saloway*.

[*Baker* v. *Hanbury* was overruled in the recent case of *Edwards* v. *Saloway*, 12 Jur. 487, 493, in which the decision of Vice-Chancellor Knight Bruce (12 Jur. 493, 494) was affirmed by Lord Cottenham, (12 Jur. 487, 488). In this case, E. P. gave the residue of his real and personal estate to trustees to invest the same, and pay the interest to his wife for life for her separate use, and, after her decease, as to half the capital, upon trust for such persons as his wife by deed or will should appoint; and, in default of appointment, he gave the same unto, between, and amongst her next of kin, as in case of distribution of intestate's effects. The wife died in the lifetime of the testator, without having exercised the power of appointment over the moiety of the residue. In the course of the argument, Vice-Chancellor Knight Bruce observed: "Speaking with the utmost respect and deference, I cannot but admit that *Baker* v. *Han-*

(*a*) [In *Edwards* v. *Saloway*, 12 Jur. 493, Mr. Russell read the judgment of Sir John Leach in *Baker* v. *Hanbury*, from a MS. note taken by him.]

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bury somewhat surprises me;" and his Honor held, that, in the case before him, the bequest of the moiety of the residue did not lapse. The following is Lord Cottenham's judgment:—"Nothing is more certain than that legatees, described as next of kin to be ascertained at a future time, is a description by which parties answering to it may take benefits under a will. The question then, in this case, is, are they to be deprived of the benefit, merely on a speculation that the testator would not have made such a disposition of his property as he has made, if he had known that the party, through whom the next of kin take, would have died in his lifetime? The Court, however, has only to do with what is actually expressed. The testator, after providing that his wife should have power to dispose of this property by deed or will, directs:—'And in default of any such direction, limitation, or appointment, my will is, that the same shall be received and enjoyed by, and I hereby give the same unto, between, and amongst her next of kin, as in case of distribution of intestate's effects.' Are not the next of kin capable of taking under this gift? They clearly are. The testator has made the rules of law apply to this property just as they would have applied had it belonged to the wife herself. Why are these parties not to take because the wife died in the testator's lifetime? They are capable of taking under the description in the will, and there is no reason for their exclusion. Then, as to the authorities: these, being conflicting, leave it at my option to dispose of the case as I think most consistent with principle. There are two authorities cited, opposed to each other in every respect. The facts in each are the same, but the decisions totally differ. In *Baker* v. *Hanbury*, (3 Russ. 340), Lord Lyndhurst was of opinion that the legacy was intended to be an absolute bequest to Mrs. Reed, but that it was qualified on account of her situation as a married woman, and, therefore, held that the legacy had lapsed. This however, was dealing with the case merely on the ground of the motive of the gift. We then come to the case of *Hardwick* v. *Thurston*, (4 Russ. 380). There, Sir John Leach, after disposing of the case of *Tidwell* v. *Ariel*, (3 Madd. 403), which he considered did not apply, says: 'The daughters have an absolute gift of their respective thirds of the trust monies, but are merely tenants for life, with a power of appointment, with remainder, in default of appointment, to their next of kin. This is, therefore, the common case of the death of a tenant for life before the testatrix; and the remainder over takes effect upon the death of the testatrix. It is true, that there are introduced the words, 'as if she had died sole and intestate, to the utter exclusion of the husband;' but it must be

considered that this expression was used for the sole purpose of excluding the husband, and was not intended to exclude a child in favour of other persons more remote and uncertain.' Sir John Leach thus treats it as a substantive gift to the next of kin, and, as such, to take effect. Why, then, the next of kin, in the present case, are not to take I am at a loss to discover; and I prefer the decision of the case of *Hardwick* v. *Thurston* to that of *Baker* v. *Hanbury*. The demurrer will, therefore, be overruled; but, there being a conflict of authority, the appeal will be dismissed without costs."] DOCTRINE OF LAPSE.

It is to be observed, that, where a gift is made to a plurality of persons, as joint tenants, (which is always the construction in the absence of words of severance, in regard to both real and personal estate, *Crooke* v. *De Vandes*, 9 Ves. 197; *Swaine* v. *Burton*, 15 Ves. 365), no lapse can occur, unless *all* the objects die in the testator's lifetime; because, as joint tenants take per mis et per tout, or, as it has been expressed—"each is a taker of the whole, but not wholly and solely," (Carter, 4), any one joint tenant, existing when the will takes effect, will be entitled to the entire property. Thus, if lands are devised to A. and B., or to them and their heirs, or personal property is bequeathed to A. and B., and one dies in the testator's lifetime, the other surviving the testator will take the whole: *Davis* v. *Kemp*, Carter, 4, 5, Eq. Ca. Ab. 216, pl. 7; *Buffar* v. *Bradford*, 2 Atk. 220; *Morley* v. *Bird*, 3 Ves. 628. And the same consequence would ensue, if the gift failed from any other cause; *Humphrey* v. *Tayleur*, Amb. 136, 7 Bac. Abr. Gwill. ed. 363; *Larkins* v. *Larkins*, 3 Bos. & Pull. 16; *Short* d. *Gastrell* v. *Smith*, 4 East, 419; while it is equally clear, that, if the devisees or legatees in any of these cases had been made tenants in common, the failure of the gift as to one object, would not have entitled the others to the whole, without an express gift over of the share of the deceased object in such event: *Page* v. *Page*, 2 P. W. 489. No lapse, on death of a joint devisee.

Where, however, the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained at the death of the testator, [see ante, pp. 178, 179, and post,] the decease of any such persons during the testator's lifetime will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying never become objects of the gift. Thus, if property be given generally to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any children or child, brother or sister, surviving the testator, without regard to previous deaths; *Doe* d. *Stewart* v. *Shef-* Gifts to classes.

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field, 13 East, 526; and the rule is the same where the gift is to the children of a person then deceased; which has this peculiarity, that the class is susceptible of fluctuation only by diminution, and not by increase, the possibility of future accessions by births being precluded by the death of the parent: *Viner* v. *Francis*, 2 B. C. C. 658, 2 Cox, 190.

[As to a gift to executors as a class, and the distinction where the gift is to them nominatim and not as a class, see 1 Jarm. Wills, 296, and note (*m*).]

Distinction where the individuals of the class are ascertained before the lapse.

If, however, the class is defined at some period occurring in the testator's lifetime, the subsequent decease of any of its members, in the interval between that period and the decease of the testator, it has been thought, would occasion the lapse of their shares, precisely in the same manner as if the gift had been originally made to them nominatim. Thus, if the gift be to the children of A. *who shall be living at the decease of A.*, as tenants in common, and A. dies in the testator's lifetime, leaving four children, one of whom afterwards dies in the lifetime of the testator, the one fourth share of such child would, according to this opinion, lapse, as it would have done, if, in the first instance, the gift had been made to the four children by name: *Allen* v. *Callow*, 3 Ves. 289. In this case, the point did not arise; but Lord Alvanley expressed a decided opinion on it. [And in *Gaskell* v. *Holmes*, 3 Hare, 434, Sir J. Wigram appears to have been so strongly impressed with the same opinion, that he resorted to special circumstances to exclude its application to the case before him.] Perhaps it would have been a sounder rule to say, that the throwing into the description of children an additional ingredient, such as that of requiring that they should be living at a given period, does not vary in other respects the construction applied to the gift. [It does not seem easy to see why the Court should have taken a distinction between this case and that of a gift to the children of a person who dies in the testator's lifetime, in which case, as we have seen, there is no lapse by the death of any member of the class between the time when the class is ascertained and the death of the testator. And if a gift by a testator to grandchildren living at his death constitutes a class, (see Sir W. Grant's judgment in *Leake* v. *Robinson*, ante, p. 179), and if a gift to the children of a person then deceased constitutes a class, a gift to the children of A. who shall be living at the decease of A. no less unequivocally constitutes a class—as unequivocally indeed as words are capable of doing it. And such was the view ultimately taken by Sir J. Wigram, V. C., and acted on in the case of *Lee* v. *Pain*, 4 Hare, 250, 9 Jur. 247. In that case the testa-

trix by her will bequeathed 500*l.* upon trust for B. M. for life, with remainder to the children of B. M. living at his decease, equally between them. B. M. died in the lifetime of the testatrix, leaving three children, one of whom afterwards died in the lifetime of the testatrix. It was held that there was no lapse of the third part of the legacy by the death of one of the children of B. M. after him and before the testatrix, and that the two surviving children were entitled to the whole legacy.] DOCTRINE OF LAPSE.

It does not appear to be settled what would be the effect of a gift to some other classes of persons, as, to the next of kin or relations, as tenants in common, of A., a person who dies in the lifetime of the testator, in the event of any of the next of kin or relations dying in the interval between the decease of A. and of the testator; since, in the cases where such gifts have occurred, (and in which the entirety has been held to belong to the surviving next of kin at the death of the testator), the bequest seems to have contained no words to sever the joint tenancy: *Bridge* v. *Abbot*, 3 B. C. C. 224; *Vaux* v. *Henderson*, 1 Jac. & Walk. 388, n. Gift to next of kin of a person deceased.

Where there are several alternative gifts, and the legatee in whose favour the contingency happens dies in the lifetime of the testator, the legacy lapses precisely in the same manner as if it had been originally absolute. So, if the person whom the event determines to be the object of the gift, survives the testator, the bequest to him would not be affected by the event of the death of the alternative legatee. Thus, if a testator gives to A. an estate, or a sum of money, in case he shall attain the age of twenty-one years, and, if A. shall die under that age, to B., and A. happens to attain twenty-one, and then dies in the lifetime of the testator, the legacy will lapse; while, on the other hand, if A. had died in the lifetime of the testator under that age, the gift to B. would have taken effect: *Doo* v. *Brabant*, 3 B. C. C. 392, 4 T. R. 705. See also *Ledsome* v. *Hickman*, 2 Ver. 611; *Willing* v. *Baine*, 3 P. W. 113; *Calthorpe* v. *Gough*, 3 B. C. C. 394, n.; *Humberstone* v. *Stanton*, 1 Ves. & Bea. 385; *Walker* v. *Main*, 1 Jac. & W. 1; *Williams* v. *Jones*, 1 Russ. 517; [*Archer* v. *Jegon*, 8 Sim. 446; *Rickett* v. *Guillemard*, 12 Sim. 88. See Mr. Jarman's Treat. on Wills, Chap. L.] Alternative gifts.

[Where the devise which lapses comprises the legal or beneficial ownership only, such lapse creates a failure in the disposition only to that extent. See 1 Jarm. Wills, 299.]

And here it may be noticed, that, where an estate is devised to one, charged with a sum of money, either annual or in gross, in favour of another, the charge is not affected by the lapse of the de- Effect of lapse of devise of onerated lands.

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vise of the onerated property. Thus, if a man devises Blackacre to A. and his heirs, charged with or on condition that he pay 50*l.* a year or the sum of 500*l.* to B., in case A. should die in the testator's lifetime, the estate would descend to the heir-at-law, subject to the charge: *Wigg* v. *Wigg*, 1 Atk. 382; *Hills* v. *Worley*, 2 Atk. 605.

This principle is strongly exemplified by a case in which a person having a power of appointment over a sum of money, by will appointed a smaller sum, part of the fund in question, to A., and, in consideration thereof, he was to pay to his mother an annuity of 100*l.* during her life, for her separate use, and to enter into a bond with a penalty for the payment thereof; and the testatrix gave the residue of what she had power to dispose of to B. A. died in the donee's lifetime; but it was held, that, nevertheless, the mother was entitled to her annuity out of the fund, the whole of which, by the death of A., had devolved to B., the residuary appointee: *Oke* v. *Heath*, 1 Ves. sen. 135.

FAILURE OF PARTICULAR GIFTS.

2. *Effect of Failure of particular Gifts.*

Having shewn, generally, in what instances lapse is produced by the decease of a devisee or legatee in the testator's lifetime, the next inquiry concerns the destination of the property so intended to be given; in considering which, a distinction is to be drawn between gifts of partial interests only, and those which include the whole or entire estate or interest of the testator. First, as to the former—

Effect of death of devisee for life, &c.

Where a gift for life, or any other such partial estate, is followed by a limitation over of the residuary interest, the death of the prior devisee or legatee, in the lifetime of the testator, causes the ulterior gift to take effect in *possession;* and sometimes the circumstance that the precedent interest is removed out of the way in a manner not expressly provided for by the terms in which the remainder is limited, will not prevent this from taking place. As, if a testator devises lands to A. and the heirs of his body, and, if he dies without issue, or without leaving issue, then over, and A. dies in the testator's lifetime, leaving issue, the devise in remainder will take effect, though, according to the literal expressions of the will, the event described has not happened, the words in question being evidently used merely as a mode of framing the remainder expectant on the estate tail; (as, if the testator had said—"I give to A. in tail, with remainder over);" and not as designed to render it dependent on the contingent determination of the preceding estate. The prior devise,

therefore, failing by lapse, the ulterior devise operates as an immediate gift: *Fuller* v. *Fuller*, Cro. El. 423. [See 1 Jarm. Wills, 513, et seq.]

—Of gifts void, or refused.

So, if a devise for life or in tail is void, or is refused by the devisee, it seems, by the better opinion, that the devise in remainder will be accelerated: Perk. sect. 557, 569; Shep. Touchst. 435, 451; *Fuller* v. *Fuller*, Cro. El. 425; *Cranmer's case*, Dy. 309 *b*; but see and consider *Carrick* v. *Errington*, 2 P. W. 361, 5 B. P. C. Toml. ed. 391. [In this case lands were settled to the use of T. E. (a papist) for life; remainder to trustees during T. E.'s life to preserve contingent remainders, remainder to his first and other sons in tail male; remainder to W. E. The limitations in favour of the papist were then (before stat. 18 Geo. 3, c. 60) void; and it was held, that the remainders were not accelerated, on the special ground, that such a construction would have defeated the limitations to the first and other sons of T. E.] As to the destination of terms of years created by the will, but the beneficial interest in which is not entirely disposed of, see *Tregonwell* v. *Sydenham*, 3 Dow, 194; *Davidson* v. *Foley*, 2 B. C. C. 203; *Sidney* v. *Shelley*, 19 Ves. 352. [See Mr. Jarman's observations on these cases, 1 Treat. on Wills, 514—520.]

Devise in remainder accelerated.

Devise over, not defeated by failure of prior devise.

A strong instance of the construction which reads a secondary or substituted devise as intended to take effect in all events in which the prior devise is removed out of the way, occurs in the case of *Avelyn* v. *Ward*, 1 Ves. sen. 420, where a testator devised his real estate to A. and his heirs, on condition that, within three months after his decease, he should execute a general release to the testator's trustee of all demands; and, in default, the testator devised the estate to B. and his heirs. A. died in the lifetime of the testator; and Lord Hardwicke held, that the devise to B. took effect, the evident intention being, that, if in any event the first devise could not take place, the subsequent should; and that, if no such release was executed, whereby the demand against his estate would exist, the estate should go over. See also *Scatterwood* v. *Edge*, 1 Salk. 229; *Doe* v. *Scott*, 3 Mau. & Sel. 300. [See 2 Jarm. Wills, 707.]

Effect of lapse of devise of money charged on land.

Another species of question occurs where lands are devised, subject to the payment of a sum of money, annual or in gross, and the charge fails by the death of the devisee thereof in the lifetime of the testator, or otherwise. It is clear, that, if the charge is to arise on a contingency which does not happen, it is extinguished, and the devisee of the property has the benefit of such extinction, as the devise of the land evidently includes the interest comprised in the incumbrance, in the events alternative to those on which it is to arise.

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Thus, if lands were devised to A. in fee, charged with the payment to B. of 500*l.* in case B. should attain the age of twenty-one years, and B. died under that age in the lifetime of the testator, or afterwards, the charge would sink for the benefit of the devisee: *Attorney-General* v. *Milner*, 3 Atk. 112; *Croft* v. *Slee*, 4 Ves. 60; *Sydenham* v. *Tregonwell*, 3 Dow, 212. ["Such a gift as that in *Attorney-General* v. *Milner*, would now be held to be vested:" 1 Jarm. Wills, 301.] If B. attained the age of twenty-one years, and afterwards died in the lifetime of the testator, the point is more doubtful, depending, as it then does, on the general question, whether a sum of money primarily and absolutely payable out of land lapsing, becomes extinguished therein, or subsists for the benefit of the heir, as real estate undisposed of; which has never been decided. (But see and compare *Hutcheson* v. *Hammond*, 3 B. C. C. 128, 148, and *Noel* v. *Lord Henley*, 7 Price, 240, 1 Dan. 212, 322). And the inquiry into it would not be much aided by appealing to the decisions respecting the destination of a sum of money, the charge of which fails ab initio, on account of the illegality of its object, (as where it is devoted to charity), since the following is a brief statement of the result of those decisions:—The cases of *Arnold* v. *Chapman*, 1 Ves. sen. 108, and *Bland* v. *Wilkins*, cit. 1 B. C. C. 61, where the charge was of a gross sum, and *Gravenor* v. *Hallum*, Amb. 643, where it was a perpetual rent-charge, are in favour of the heir. [The authority of *Arnold* v. *Chapman*, was recognised by Sir John Leach in the case of *Henchman* v. *Attorney-General*, 2 Sim. & Stu. 498.] And the case of *Jackson* v. *Hurlock*, 2 Eden, 263, where the charge was of a gross sum, and the cases of *Barrington* v. *Hereford*, 1 B. C. C. 62, and *Baker* v. *Hall*, 12 Ves. 497, where it was annual, are in favour of the devisee of the land. In the case of *Sidney* v. *Shelley*, 19 Ves. 363, Lord Eldon referred to the principle in terms which might seem rather to favour the claim of the heir; but he described the cases as turning upon extremely nice distinctions. In fact, they are so directly conflicting, that no distinctions, however refined, can reconcile them. If the charged property were leasehold, there can be little doubt that a lapsed or void legacy charged on it would sink for the benefit of the specific legatee, whose title would seem to be preferable to that of the general residuary legatee. [In his Treatise on Wills, I, 308, Mr. Jarman says: "Now, considering that the four first cases were all decided upon the general principle, and, the two first particularly, after great consideration, and that they include the latest determination on the subject; and considering, too, that of the latter class of cases, *Jackson* v. *Hurlock* may have been

Rule where the devise of the charged sum is void ab initio.

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decided upon its particular circumstances, *Barrington* v. *Hereford* has been referred to by Lord Eldon as a contrary decision, and *Baker* v. *Wall* was decided in the absence of the heir, no hesitation can be felt in yielding to the authority of the first class of cases, whose preponderance seems farther increased by the dicta of Lord Eldon, who, on more than one occasion, 19 Ves. 363, 3 Dow, 212, has treated the cases in favour of the devisee as exceptions to the general rule, his language being, 'That where the gifts, rendered void by the statute, did not go to the heir, they *all* seem to have been decided upon one or other of these grounds: that the heir-at-law was completely disinherited, and that his claim was barred under the intention of the testator.'"]

We now proceed to consider the effect of the lapse or failure of absolute gifts, i. e. gifts including the testator's entire interest. If the lapsed devise or bequest were general or residuary, the result necessarily would be, to let in the title of the heir-at-law to real estate, and of the next of kin to personalty. If it were a particular devise or bequest, then the relative claims of the residuary devisee or legatee on the one hand, and of the heir-at-law or next of kin on the other, would require to be adjusted upon the principles respectively governing residuary clauses in regard to real and to personal property, which in many respects are widely different.

3. *Operation of Residuary Bequest.*

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Residuary bequest includes all the property at the death.

A will of personal estate comprised all the property belonging to the testator at the time of his decease; and such, it is clear, would have been its operation, even without words expressly pointing at future acquisitions; as, where the bequest was in general terms of the testator's property or effects. Indeed, so averse were the Courts to suppose an intention in the testator to confine the disposition to present personal property, which would generally have produced a partial intestacy, that even a gift of all the property "*I am* possessed of," was thought not to have this restrictive effect; (see *Wilde* v. *Holtzmeyer*, 5 Ves. 816; see also *Bland* v. *Lamb*, 2 Jac. & Walk. 399); though, generally speaking, verbs and adverbs expressive of present time refer to the date of the will. See *Abney* v. *Miller*, 2 Atk. 597. But the inconvenience of so restricting the disposition, of course, did not weigh against a clearly expressed intention. See *Davers* v. *Dewes*, 3 P. W. 40.

Its operation in relation to lapsed gifts.

The necessary consequence of holding a residuary bequest to operate upon the property as it exists at the death, is, that there

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cannot be an intestacy in regard to any the least part of the personal estate while there is an operative residuary gift, since it comprises whatever does not eventually pass under the specific and particular bequests of the will, as well those which are originally void, as those which lapse by the decease of legatees in the lifetime of the testator; *Jackson* v. *Kelly*, 2 Ves. sen. 283; *Brown* v. *Higgs*, 4 Ves. 708; even though it should become, by this means, a bequest of the entire personal property. But, of course, a residuary clause may be so specially framed as not to take in lapsed legacies: *Attorney-General* v. *Johnstone*, Amb. 577. A gift, however, of the residue of real and personal estate "not hereinbefore specifically disposed of," has been held to include specific legacies lapsing, the words being read, "not hereinbefore *particularly* disposed of:" *Roberts* v. *Cooke*, 16 Ves. 451.

Legacy to residuary legatee.

It is to be observed, too, that an express declaration that a legacy shall, in the event of the legatee dying before the testator, fall to the person who is made residuary legatee, is not wholly without effect, since it places the residuary legatee, in respect of the legacy in question, in the situation of a particular legatee; so that, in the event of a deficiency of assets, he would be liable to abate only pari passu with other legatees of the same class: *Rose* v. *Rose*, 17 Ves. 347.

Failure of gift of residue itself.

But, when the disposition of an aliquot share in the residue itself fails, intestacy is produced to the extent of such failure; for instance, in the case of a residue given in moieties, to hold that one moiety lapsing would accrue to the other, would be to hold that a gift of a moiety of the residue shall eventually carry the whole; whatever argument applies to the entirety of the moiety applies to every part of it: the distinction is mere subdivision. Per Sir T. Plumer, judgment in *Skrymshe* v. *Northcote*, 1 Swanst. 570. See also *Bagwell* v. *Dry*, 1 P. W. 700; *Page* v. *Page*, 2 P. W. 489; *Owen* v. *Owen*, 1 Atk. 495; *Peat* v. *Chapman*, 1 Ves. sen. 542. So, where the residue was bequeathed to three persons as tenants in common, the revocation by a codicil of the bequest as to one of the three legatees was held not to entitle the other two, but to let in the title of the next of kin to such one third share: *Cheslyn* v. *Cresswell*, 2 Ed. 123, 3 B. P. C. Toml. ed. 246. But, the postponement of the possession, or even of the vesting of the residuary personal property to a period subsequent to the testator's death, does not necessarily produce intestacy as to the intermediate income, which would accompany the capital in its final destination. Thus, if a testator bequeaths the residue of his personal estate to such of the children of A. as shall

Future gift of residue.

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happen to attain the age of twenty-one, the income accruing in the interval between the death of the testator and the happening of the vesting event will pass, together with the capital, to the legatees: *Butler* v. *Butler*, 2 Atk. 473, 3 Atk. 58; *Trevanion* v. *Vivian*, 2 Ves. sen. 430; *Bullock* v. *Stones*, Id. 521; [see *Cunningham* v. *Murray*, 1 De G. & Sm. 366;] (supposing the accumulation not to be carried beyond the legal term, vide ante, p. 195). And, if the bequest failed in event, by reason of A. having no child who survived the testator, and lived to attain the age of twenty-one, the accumulated income, with the capital (unless there was an alternative disposition of them), would go to the testator's next of kin, as personalty undisposed of. See *Chambers* v. *Brailsford*, 18 Ves. 368.

RESIDUARY DEVISE.

4. *Operation of a Residuary Devise—Question whether a Devisee takes beneficially or as Trustee.*

Every devise of realty specific, under the old law.

As a will of real estate operated only on the property of which the testator was seised at the time of its execution (vide ante, p. 35), it followed that every devise, however general in terms, was necessarily specific; see *Hill* v. *Cock*, 1 Ves. & Bea. 175; and a residuary devise could have no wider extent of operation, than if the testator, instead of devising the rest of his estate, had given by name the lands he had not previously disposed of. Such a devise, therefore, was incapable of being enlarged by subsequent events to a comprehension of any subject not originally within its reach; so that, if a devise in fee of particular lands lapsed by the death of the devisee in the testator's lifetime, the residuary devisee was not entitled to stand in the place of such deceased devisee: *Wright* v. *Hall*, Fort. 182; *Roe* v. *Fludd*, Id. 184.

Effect of particular devises lapsing, under the old law.

—being void ab initio.

And this principle might seem to apply with exactly equal force to a devise which was void ab initio; for, if a man, being seised of Blackacre and Whiteacre, devised Blackacre to A. in fee, and the residue of his lands to B., the latter devise, viewed in this light, would amount only to a devise of Whiteacre, and could not, it should seem, be extended to Blackacre, in case it should turn out that the devise of the latter was void, from its being in favour of charity, or from any other cause affecting its validity at the time of the execution of the will. A different doctrine, however, appears to have obtained in several instances. Thus, in the case of *Doe* d. *Stewart* v. *Sheffield*, 13 East, 527, where a testator, after devising lands to the sisters of J. H., devised certain other estates, and all his other lands and hereditaments whatsoever and wheresoever, *and not thereinbefore*

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disposed of, to S. and his heirs; the Court of King's Bench treated it as clear, that, if the devise to the sisters of J. H. had failed, by reason of there being no object living at the execution of the will, (but which did not prove to be the fact, there being *one* sister, who was held to be entitled to the whole), *the heir would have been excluded by the residuary devise*. Le Blanc, J., thought that this was clear, independently of the words "not hereinbefore disposed of;" upon which others of the Judges relied. Perhaps these words do not much vary the principle, because they merely shew (what is always to be presumed) that a testator conceives the preceding devises of his will to have disposed of the estates purporting to be given by them; the words therefore are synonymous with "not hereinbefore *expressed to be* disposed of."

So, in the case of *Williams* v. *Goodtitle* d. *David*, 10 Barn. & Cress. 895, (stated ante, p. 134), the Court of King's Bench took it for granted that a devise of all the residue of the testator's real estate not thereinbefore disposed of, would pass an estate which had been devised "upon trusts that were bad in law." See *Page* v. *Leapingwell*, 18 Ves. 453; *Jones* v. *Mitchell*, 1 Sim. & Stu. 293.

Operation of residuary devise on undisposed of interests.

If the particular devises of the will dispose of less than the testator's entire estate in the subject-matter, the residuary devise will, even in a will made before the year 1838, attach on the remaining estate, precisely in the same manner as if such interest had been in terms given to the residuary devisee. Thus, if lands of inheritance are devised to a person for life or in tail, a residuary clause will carry the reversion in fee expectant on such estate for life or estate tail; *Cook* v. *Gerrard*, 1 Lev. 212; *Willows* v. *Lydcot*, 2 Vent. 285; *Doe* d. *Briscoe* v. *Clarke*, 2 New Rep. 343; and which reversion, in the event of the death of the devisee for life or in tail in the lifetime of the testator, would, at the death of the testator, vest as an estate in possession. And the reversion in fee would not be excluded by the fact that the devise was expressed to embrace only the lands *not before devised*, (for these words would be considered as referring to the interest, and not to the corpus of the lands; *Rooke* v. *Rooke*, 2 Vern. 461); or by the fact that it was made in favour of the particular devisee for life or in tail himself; who, therefore, by the combined operation of the particular and residuary devise, would take the entire fee-simple; *Ridout* v. *Pain*, 3 Atk. 486; see also *Bradford* v. *Belfield*, 2 Sim. 264; *Williams* v. *Goodtitle*, 10 Barn. & Cres. 895; or by its appearing that the residuary property was charged with the payment of an immediate annuity: *Doe* v. *Fossick*, 1 Barn. & Adol. 186.

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So, where the particular devise disposes of the fee-simple in certain events only, the residuary clause will carry the fee in the alternative events. Thus, if lands are devised to A. in fee, in case he shall attain the age of twenty-one years, or to the children of B. who shall be living at his decease, and the residue of the real estate to C. in fee, it is clear, that if A. should die under twenty-one, or no child of B. should be living at his decease, the property would belong to C. by virtue of the residuary devise: *Doe* v. *Scott*, 3 M. & Selw. 300; *Doe* v. *Fossick*, 1 Barn. & Adol. 186. See also Willes, 300. And there can be no doubt that the principle would equally apply where a testator, after devising an immediate estate in fee, makes it defeasible on a certain event; the executory fee arising on such event, if not otherwise disposed of, would pass by the residuary clause, though the contrary seems to have been considered in the case of *Doe* v. *Pearson*, 6 East, 173 (*a*).

—on lands contingently devised in fee.

—on the immediate income of lands devised in futuro.

And it is to be observed, that, wherever the immediate rents and profits are left undisposed of by any particular devise in the will, the residuary clause will carry such rents and profits, (which would otherwise descend to the heir, *Stephens* v. *Stephens*, Cas. temp. Talb. 228); and they would not be excluded from such residuary devise, by the circumstance of its containing a trust for sale, which might seem not very apposite to an interest of this nature; for though such an argument might have weight in construing equivocal expressions, it cannot cut down the effect of clear unambiguous words: *Duffield* v. *Duffield*, 3 Bligh, N. S. 261. [In *Duffield* v. *Duffield*, however, the trust for sale had been cancelled, and the Judges expressly disclaimed any reference to it, saying, that it was to be considered as if it had never been inserted in the will.]

General remark.

The result of the whole seems to be, that there could be no intestacy in regard to any portion of the real estate of which a testator was seised when he made his will, if that will contained a valid and operative residuary devise, and all the particular devises in the will took effect.

In applying the doctrine, that the ulterior beneficial interest in particular lands, previously devised for partial purposes, passes by a residuary devise, a previous and sometimes rather nice question is, whether the particular devise vests in the devisee benefically such ulterior interest, or leaves it undisposed of, so as to let in (if there

(*a*) The unwillingness of the Court, in this case, to give the residuary devise its fair operation presents a singular contrast with the anxiety evinced in the subsequent case of *Doe* v. *Sheffield*, 13 East, 526 (commented on ante, p. 216), to push its effect beyond what is warranted either by principle or authority.

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had been no residuary gift) the title of the heir. In regard to this, the distinction seems to be, that, if I give to A. and his heirs all my real estate, *charged with* my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is *upon trust* to pay my debts, that is a devise for a particular purpose, and nothing more; the former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest—Per Lord Eldon, in *King* v. *Denison*, 1 Ves. & Bea. 272. In *Hill* v. *Bishop of London*, 1 Atk. 618, where a testator devised an advowson to his honoured mother-in-law, G. H., willing and desiring her to sell and dispose thereof to certain colleges, Lord Hardwicke considered the devise to be beneficial, being only an injunction on the devisee to enjoy the thing devised in a particular manner.

Distinction between beneficial and fiduciary devises.

So, in the case of *Rogers* v. *Rogers*, 3 P. W. 193, where a testator made and constituted his dearly beloved wife his sole executrix, and heiress of all his lands and real and personal estate, to sell and dispose thereof at pleasure, and to pay his debts and legacies, the devisee was held to take beneficially, subject to the debts and legacies, to the exclusion of the heir. And, in the subsequent case of *King* v. *Denison*, 1 Ves. & Bea. 261; (S. P. *Smith* v. *King*, 16 East, 293), the same construction was given to a devise of the testatrix's real estate to her cousin, the wife of R., and to her cousin A., their heirs and assigns for ever, *subject nevertheless to, and chargeable with*, the payment of the annuities thereinafter mentioned. (See further, on this point, *Wych* v. *Packington*, 3 B. P. C. Toml. ed. 44; *Hobart* v. *Countess of Suffolk*, 2 Vern. 644; *Coningham* v. *Mellish*, Pre. Ch. 31).

Examples of beneficial devises.

Of course, the mere circumstance of a pecuniary legacy being given to the heir, will not rebut a resulting trust in his favour; *Starkey* v. *Brooks*, 1 P. W. 390; (see also *Randall* v. *Bookey*, 2 Vern. 425); but parol evidence, it seems, is admissible for the purpose: *Mallabar* v. *Mallabar*, Cas. temp. Talb. 78.

[By the 25th section of the new Wills Act, 7 Will. 4 & 1 Vict. c. 26, it is provided, "That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."]

By stat. 7 Will. 4 & 1 Vict. c. 26, s. 25, residuary devise includes real estates comprised in lapsed or void devises.

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[As to the debateable point respecting the destination of a specific sum given out of real estate to a person who dies in the testator's lifetime, or the gift of which is void ab initio, Mr. Jarman says: "It is apprehended that the act applies to such a case; for a sum of money charged on land is clearly 'an interest' in real estate." See 1 Jarm. Wills, 310. "If, however," continues Mr. Jarman, "the will were anterior to the year 1838, or if (whatever be its date) it does not contain an operative residuary devise, or the sum charged (the destination of which is in dispute) affects the property comprised in such devise, of course the question between the heir and the devisee of the land may even now arise; so that the old law still deserves the undiminished attention of the student and practitioner. It is clear also, that the statute does not apply to the class of cases, in which the gift of a sum of money charged upon land on a contingency is defeated by the failure of the event (whether it be the decease of the object before a certain age, or otherwise), and not by lapse." See also Mr. Jarman's observations on the operation of a general devise in regard to void, lapsed, and partial specific devises, 1 Jarm. Wills, 587—598.]

Whether the act affects destination of lapsed sums charged on real estates.

[By the 32nd section of the same act, it is provided, "That, where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."] See *Harris* v. *Davis*, 1 Coll. 416.

By stat. 7 Will. 4 & 1 Vict. c. 26, s. 32, devises of estates tail shall not lapse if devisee leaves issue.

[And by the 33rd section of the same act it is enacted, "That where any person being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." See Mr. Jarman's observations on the construction of these two sections, 1 Jarm. Wills, 312—314.]

7 Will. 4 & 1 Vict. c. 26, s. 33. Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

[It has been held that the 33rd section does not substitute for the predeceased devisee or legatee the issue whose existence prevents the lapse, and that a devisee or legatee within the section would take

Cases determined under 7 Will. 4 & 1 Vict. c. 26.

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the same provision under his father's will, and with the same powers and incidents of property, as if he had survived the testator: *Johnson* v. *Johnson*, 3 Hare, 157. In *Griffiths* v. *Gale*, 12 Sim. 354, it was held, that the 33rd section, even when taken with the 1st section of the act, does not apply to a testamentary appointment. In *Winter* v. *Winter*, 5 Hare, 306, the testator, by will, dated the 13th of November, 1833, gave one-sixth of his residuary estate to one of his sons absolutely, who was also thereby made one of the devisees in trust and executors of his estate. The son died after the Wills Act came into operation, leaving issue; and, after his death, the testator made a codicil to his will, altering a bequest to another child, but in other respects confirming his will. It was held that the gift to the son did not lapse, but took effect by the operation of the 33rd and 34th sections of the statute 7 Will. 4 & 1 Vict. c. 26, as if the son's death had taken place immediately after the death of the testator, the effect of the republication of the will by the codicil, under the 34th section, being the same as if the testator had at the date of the codicil made a will in the words of the will to be republished. See also *Harris* v. *Davis*, 1 Coll. N. C. 416; *Andrew* v. *Andrew*, Id. 699.]

UNDISPOSED-OF REALTY DIRECTED TO BE SOLD.

5. *Real Estate directed to be sold—Undisposed-of Interests therein —Doctrine of Constructive Conversion.*

As to undisposed-of interests in realty directed to be sold.

Where real estate is directed to be sold for particular purposes, the conversion is considered as made for those purposes, and no farther; and, in the event of their entirely or partially failing, the property, or the unapplied portion of it (as the case may be), retains its original character of real estate, and devolves, as such, to the real representative. Thus, if a testator devises his lands of inheritance to trustees, upon trust to sell for the payment of debts, in aid of the personal estate, or with a direction to pay the monies arising from the sale to A., and the produce of the sale is not required for payment of debts, the personalty being sufficient, or A. dies in the testator's lifetime, the beneficial interest in the land, if unsold, or the produce thereof, if a sale has taken place, belongs to the heir as real estate undisposed of, and not to the next of kin, the conversion being made for the purposes of the will only, and the claim of the next of kin arising dehors the will: *Ackroyd* v. *Smithson* (*a*), 1 B. C. C. 503;

(*a*) [In this case of *Ackroyd* v. *Smithson* (remarkable for the celebrated argument of Mr. Scott (Lord Eldon) which Lord Thurlow admitted to have changed his opinion) the testator, after giving several pecuniary legacies, devised all his real and personal estate in trust to be sold and converted into money, to pay

UNDISPOSED-OF REALTY DIRECTED TO BE SOLD.

Robinson v. *Taylor*, 2 B. C. C. 589; *Chitty* v. *Parker*, 4 Id. 411; *S. C.*, 2 Ves. jun. 271; *Collins* v. *Wakeman*, Id. 683; *Hill* v. *Cock*, 1 Ves. & Bea. 173; *Gibbs* v. *Rumsey*, 2 Ves. & Bea. 294; *Dixon* v. *Dawson*, 2 Sim. & Stu. 327. And the rule is the same where the vacancy in the disposition is occasioned, not by the disappointment or failure of the testator's purpose, (as in the examples just put), but by the original contractedness of that purpose. As, where lands are devised upon trust for sale, and the proceeds are directed to be invested upon trust for A. for life, and no farther disposition is made of the produce of the sale, the ulterior interest devolves to the heir, as real estate: *Wilson* v. *Major*, 11 Ves. 205. See also *Robinson* v. *Taylor*, 2 B. C. C. 589. And an express declaration that the monies arising from the sale shall be deemed personal estate, will not entitle the next of kin, since the declaration will be construed as intended to apply only to persons claiming under the will, and not to regulate the devolution of the property aliunde: *Countess of Bristol* v. *Hungerford*, 2 Vern. 645. [As to the case of *Phillips* v. *Phillips*, 1 Myl. & K. 649, where a contrary construction prevailed, see Mr. Jarman's observations in his Treatise on Wills, Vol. I, p. 560.]

[In the recent case of *Fitch* v. *Weber*, 12 Jur. 645, undisposed-of proceeds of real estate devised for sale were held to belong to the heir-at-law of the testatrix, notwithstanding a direction in the will that the trustees should stand possessed of such proceeds as a fund of personal and not real estate; and that, for such purpose, such proceeds, or any part thereof, should not in any event lapse or result for the benefit of her heir-at-law. Vice-Chancellor Wigram's judgment in this case contains a review of the cases on this subject. His Honour said:—"As the testatrix did not make any codicil to her will, the surplus proceeds of her real estate remaining, after payment of the legacies given by the will, are of course left undisposed of. Those proceeds have been claimed, on the one hand by the testatrix's heir-at-law, and on the other by her next of kin; and the

debts and legacies, and funeral and testamentary expenses, and the surplus to be paid to the legatees in the proportion of these legacies. Two of these legatees died in the testator's lifetime. On the question, whether these lapsed shares belonged to the heir-at-law or next of kin of the testator, Lord Thurlow at first was of opinion that the next of kin were entitled; but, upon hearing Mr. Scott's argument, decided in favour of the heir. He said, "That he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say, that, if all the legatees had died, the heir could, as he certainly might," he said, "prevent a sale; and yet to say, that, because a sale was necessary, the heir should not take the undisposed part of the produce."]

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question is, which claim is to prevail. The property to which the question relates was real estate at the death of the testatrix; and, therefore, the onus is upon the next of kin to shew a devise in their favour. This, I may observe, is the test by which, in cases of the highest authority, the rival claims of the heir-at-law and next of kin have been decided. I will first consider the case, omitting the clause which, to some extent at least, excludes the heir, and then consider the effect of that clause upon the scope of the will. In considering the case, omitting the clause which excludes the heir, I will first consider how it stands, omitting the direction to the trustees to stand possessed of the property 'as a fund of personal and not real estate.' Upon that supposition the will would stand thus:—'I declare that my said trustees or trustee shall stand and be possessed of the proceeds to arise from the sale of my messuages, lands, tenements, and hereditaments upon the trusts after mentioned.' That is, therefore, a mere conversion without any declaration as to its being personal estate. Now, in that simple case, the authorities are too clear for it to be necessary to cite any. The will may and does determine in what quality the property shall be taken by those upon whom it shall devolve; but it is silent as to who are the persons to take, and the original right of the heir-at-law must prevail. Omitting the cases *Countess of Bristol* v. *Hungerford*, (2 Vern. 645, 3 P. Wms. 194); in note upon *Rogers* v. *Rogers*, (Prec. in Chanc. 81, 1 Eq. Abr. 244, pl. 44, *S. C.*); and *Phillips* v. *Phillips*, (1 M. & K. 649); the next of kin have no reported case which supports their claims upon a devise by implication. The former of these cases, it was admitted, could not be relied upon, for the same individuals were there both heirs-at-law and next of kin, and the decree declares their title as 'heir-at-law and representatives' of the testator. In *Phillips* v. *Phillips*, the decision turned upon the direction in the will that the surplus proceeds of the real estate should be deemed part of the testator's personal estate. *Jessop* v. *Watson*, (Id. 665), (decided by the same learned Judge who decided *Phillips* v. *Phillips* and *Amphlett* v. *Parke*, (11 Sim. 275),) is an authority, that, in the absence of the direction that the surplus proceeds of the real estate should be deemed personal estate, those proceeds would go to the heir-at-law. The next question then is, whether the direction, that the real estate should be converted into personal, as 'a fund of personal and not of real estate,' whether those additional words make any difference,—words which are, perhaps, less favourable to the claim of next of kin than if the testatrix had said it should be part of her personal estate; but I do not mean to rely on that distinction. In *Amphlett* v. *Parke*,

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and *Phillips* v. *Phillips*, similar expressions occurred. Sir J. Leach decided both cases in favour of the claim of the next of kin. The former, *Amphlett* v. *Parke*, was reversed on appeal by Lord Chancellor Brougham; the latter has never been reviewed on appeal. But *Collins* v. *Wakeman*, (2 Ves. jun. 683), notwithstanding the criticisms at the bar, is, I think, an authority against the effect attributed by Sir J. Leach to the words I am now considering. I think, also, it is impossible to read the judgments of the Lord Chancellor, in *Cogan* v. *Stephens*, (1 Beav. 482, n.), and in *Williams* v. *Williams*, (M. R., 11th Dec. 1835, 5 Law J., N. S., Ch. 84), without discovering in both the clear expression of his disapprobation of the decision in *Phillips* v. *Phillips*. The reasoning of Lord Langdale, in *Johnson* v. *Woods*, (2 Beav. 409), precludes the supposition that he would do otherwise than dissent from the decision in *Phillips* v. *Phillips*. In *Flint* v. *Warren*, (14 Sim. 554), in which the testator also directed the proceeds of his real estate to be deemed part of his personal estate, the Vice-Chancellor of England decided, on further directions, (28th February, 1848), that the heir was entitled to the surplus proceeds of the real estate. *Phillips* v. *Phillips* was cited before him; but, according to the note upon the brief of counsel in that case, the Vice-Chancellor said, that if he decided otherwise than in favour of the heir, he should be doing violence to a settled principle of law. In *Gordon* v. *Atkinson*, (19 July, 1847), the same expressions occurred. *Phillips* v. *Phillips* was cited, but the Vice-Chancellor Knight Bruce also decided against that case. And if the expression of my opinion could add anything to the weight of these authorities, I would ask (the question being whether the will contains a devise by implication to the next of kin) how it is possible that such an implication can be found in a will, every disposition in which is hostile alike to the next of kin and to the heir-at-law. With respect to the rest of the cases, I agree with Mr. Wood, that they may be safely dealt with, as establishing the undisputed proposition, that the Court must give effect to any legal devise a testator may make, and as material only so far as they may shew in what way the principle has been applied in cases similar to that before the Court. The decision in this case must, therefore, in my opinion, depend wholly upon the effect given to the words, 'for which purpose I declare that such proceeds or part thereof shall not in any event lapse or result for the benefit of my heir-at-law.' The will, therefore, stands thus: It declares that the trustee or trustees are to stand possessed of the proceeds to arise from the sale of the hereditaments as a fund of personal and not real estate. That would not give it to the next of kin. The will then

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proceeds, 'for which purpose I declare that such proceeds, or any part thereof, shall not in any event lapse or result for the benefit of my heir-at-law.' To try the effect of this clause, let it be supposed that the testatrix had made a codicil, disposing of the whole of the fund, and the devisee afterwards died in her lifetime, so as to make, strictly speaking, a lapse or resulting trust for the heir-at-law. Now, I admit, that at the close of the argument I was under impressions favourable to the next of kin, and much trouble and anxiety it would have saved me to have retained the impression I then had; but I am satisfied that I should be giving an undue effect to the words in question, if I were to found upon them a gift by implication in favour of the next of kin. To explain my view of the case, I set out by assuming that the previous words of the will, down to the words 'shall be deemed a fund of personal estate,' do not express an intention in favour of the next of kin. The argument, then, of the next of kin must be, that the intention to exclude the heir makes the previous words of the will express that which, per se, they do not express. This must be the argument, for nothing can be more clear than that the mere intention to exclude the heir will be void and inoperative, unless there be a gift to some one else. Now, is the meaning thus sought to be infused into the previous words of the will necessarily implied in the clause excluding the heir? What, in the first place, is the purpose for which the testatrix says she excludes the heir? It is simply that the real estate may be made a fund of personal estate. But that purpose will not, per se, disinherit the heir, except for the purposes of the will; and if the purposes for which the heir-at-law is excluded may be taken as the measure of the intended effect of the exclusion, the clause will disinherit the heir for the purpose of the will, but no further. Again, suppose the testatrix to have added, 'I declare that such proceeds, or any part thereof, shall not, in any event, lapse or result for the benefit of my heir-at-law, but shall fall into the residue of my estate.' Such words would, I apprehend, have put the claim of the next of kin out of the question. It would then have been plain that the purpose of the testatrix was to provide that lapsed legacies should fall into the residue, so as to give the whole to her legatees, (particular or general), to the exclusion of the heir, but not to prefer the next of kin to the heir in cases not affected by her testamentary disposition; in other words, to disinherit the heir for the purposes of the will, and no further. It would be a conversion out and out for the purposes of the will. Is it necessary to carry the effect further? This point was put by Mr. Walker in the strongest possible light for the next of kin. He

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urged, that, in the reported cases, the testatrix had been employed only in what he calls the work of testacy, and that the Court had refused to infer therefrom any intention applicable to the case of intestacy; whereas, in this case, the work upon which the testatrix was employed was intestacy; and it is not to be denied that the testatrix, intending only to effect a limited object, may have given directions more extensive than that limited purpose required. But in answer to this, it must be remembered, that what I am called upon to do is not to give effect to an intention expressed in the will, but to imply an intention not expressed, in favour of parties to whom the testatrix's testamentary dispositions are as hostile as the clause of exclusion is to the heir,—parties whom she had excluded as directly as she had excluded the heir. How can I, in such circumstances, infer an intention in favour of those parties, much less say that such intention is a necessary implication? Admitting the intention to exclude the heir, is not the intention to exclude the next of kin equally clear? Where, then, is there room for an implication in favour of the next of kin? In these circumstances, I feel myself called upon to follow the course of decisions, in holding that the testatrix has expressed an intention to exclude the heir only for the purposes of her will, and that if her words express more, and she has failed to say who shall take the surplus, the law must dispose of it. The heir-at-law is excluded in one part of the will, and the next of kin in another part. As the law, therefore, must dispose of it in this view of the case, I give full effect to every word in the will, including the words, 'in any event,' in their application to cases to which, I think, the testatrix meant to apply them, and I restrain the application of the words only in a case to which the will does not apply; and I here suppose the testatrix actually to have made an appointment disentitling the next of kin. She has not, so far as she has gone, expressed an intention in favour of the next of kin, but has reserved the whole for testamentary disposition. If, by her will, she had disposed of it in favour of her next of kin, they would have taken it as devisees, and would not have taken it except in that way. Now, it was said, that, by putting this construction upon the will, I should, in effect, be deciding, that, in no possible case, can the next of kin take by implication. I do not decide any such case. I decide only, that where a testatrix has shewn an intention not to die intestate, which she has here, and has, therefore, shewn an intention by her testamentary disposition hostile to the next of kin, unless by bequest, and where those words of exclusion of the heir have a sensible operation, without applying them to a general intestacy, that there is no necessary impli-

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cation in favour of the next of kin. I rely more than all upon what I call the plain common sense of the case. There could be no intention in favour of those whom the will excludes. The heir takes not by intention, but by the absence of intention."]

Produce of realty will not pass by residuary bequest.

Even in regard to the will itself, a mere devise in trust for sale does not constitute the produce personalty, for all purposes. For instance, it will not pass under a general or residuary bequest of personal estate. Thus, if a testator devises his real estate to trustees, in trust for sale, for the payment of his debts, or directs the produce to be invested in trust for A. for life, (making no farther disposition), and bequeaths his personal estate to A., the latter bequest would not pass the interest in the real estate not exhausted by the devise: *Berry* v. *Usher*, 11 Ves. 87; *Wilson* v. *Major*, Id. 205; *Halliday* v. *Hudson*, 11 Ves. 205; *Maughan* v. *Mason*, 1 Ves. & Bea. 410. However, a declaration that the monies arising from the sale shall be considered as part of the personal estate, will have the effect of making them pass by a general or residuary bequest of personalty: *Collins* v. *Wakeman*, 2 Ves. jun. 683. And this construction will prevail, whenever, from the whole will, such an intention can be collected: *Mallabar* v. *Mallabar*, Cas. temp. Talbot, 78; *Kellet* v. *Kellet*, 3 Dow, 248; *Brown* v. *Bigg*, 7 Ves. 280.

—will pass by residuary devise.

A residuary devise of real estate will, beyond all doubt, carry the undisposed-of produce of particular lands devised to be sold. As, if a testator devises Blackacre to trustees, upon trust to sell for payment of debts, and then devises all the residue of his real estate to A. in fee, such part, if any, of the produce of Blackacre as should not be wanted for payment of debts, would belong to A., under the residuary clause; *Goodtitle* v. *Knot*, Cowp. 43; since it would result to the heir, if there were no such clause: *Culpepper* v. *Aston*, 2 Ch. Cas. 115, 221. But, if the devise of the produce of particular lands lapses by the death of the devisee in the testator's lifetime, it is clear, that, by the effect of the same principle which would exclude the lands themselves from passing by the residuary devise, such devise would not operate on the fund in question.

Destination of lapsed legacy out of produce of realty.

Where a sum of money which is payable out of the produce of lands, unmixed with the produce of the personal estate (*a*), lapses, it either devolves to the heir, as an undisposed portion of a real fund, or falls into the residue of such fund, for the benefit of the devisee. In the case of *Hutcheson* v. *Hammond*, 3 B. C. C. 128, 148, Mr. Justice Buller and Lord Thurlow successively held, that

(*a*) As to the effect of this circumstance, vide post, p. 228.

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the lapsed sum belonged to the heir, as real estate; but, in the subsequent case of *Noel* v. *Lord Henley*, 7 Price, 240; *S. C.*, 1 Dan. 212, 322, the House of Lords, without noticing the former decision, determined in favour of the residuary devisee of the fund. [See Mr. Jarman's observations on the case of *Noel* v. *Lord Henley*, 2 Jarm. Wills, 572—575. Mr. Jarman thinks (p. 575) that Lord Brougham's judgment on the appeal in the case of *Amphlett* v. *Parke*, 2 Russ. & Myl. 221, affords the strongest possible confirmation of the doctrine of *Hutcheson* v. *Hammond*, in opposition to *Noel* v. *Lord Henley*.]

Effect where legacy was void ab initio.

The destination of a similar sum, the devise of which, being for an illegal purpose, failed ab initio, is equally doubtful, as will appear by the following statement of the leading authorities. In *Page* v. *Leapingwell*, 18 Ves. 463, a testator devised certain real estates to trustees, in trust to sell, and, out of the monies arising therefrom, to pay certain legacies, including two sums of 200*l.* to the poor of two parishes, and to apply the overplus for the benefit of certain persons. There was also a general disposition of the residue of his real and personal estate not thereinbefore disposed of. Sir Wm. Grant, M. R., observed, that the disposition as to the 200*l.* was void, as a devise to a charity, and therefore lapsed (*a*). According to the decree, however, his Honor appears to have decided, that the 200*l.* went, not to the heir, as might have been expected from his remarks in the judgment, *but to the general residuary devisee.*

Remark on *Page* v. *Leapingwell.*

It does not appear whether Sir Wm. Grant grounded his opinion on the general doctrine, that a residuary devise would take in the subject-matter of particular devises failing from circumstances existing at the time of the execution of the will, or whether he considered that this effect was produced by the words *not thereinbefore disposed of*, in accordance with the opinion of the Court of King's Bench, in the case of *Doe* v. *Sheffield* (ante, p. 215), of which, as well as *Williams* v. *Goodtitle* (ante, p. 216), the decision of the Master of the Rolls might seem to be powerfully confirmatory, were it not that the decision itself is irreconcileable with the subsequent case of *Jones* v. *Mitchell*, 1 Sim. &. Stu. 293, where A. devised his real estate (after certain limitations) to trustees, in trust to be sold, and, out of the monies to be produced by the sale, to pay certain legacies, and then a legacy of 800*l.* to charities, and to pay the residue to B.,

(*a*) The editor, in stating this case in a former publication (2 Jarm. Pow. Dev. 86), was led, by the observations which fell from the Master of the Rolls, into a misconception of the real import of the decision, as disclosed by the decree.

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Sir J. Leach, V. C., held that the void legacy of 800*l.* belonged to the heir, on the principle *that the residuary devisee of real estate, or of the price of real estate, could take nothing but what was at the time intended for him.*

Case of *Jones* v. *Mitchell* considered.

The only distinction between this case and *Page* v. *Leapingwell* is, that, in the latter case, there was a general residuary devise, distinct from the gift of the produce of the sale; but this circumstance seems to be immaterial; for, where, as in *Jones* v. *Mitchell*, the entire residuary real estate is subject to a trust for sale, the residue of that fund is, in effect, the residue of the whole real estate. It is to be regretted, therefore, that the attention of the Vice-Chancellor was not drawn to the decision of the Master of the Rolls. [See Mr. Jarman's observations on these cases, 1 Treat. on Wills, 570, 571.]

There are several other cases corroborative of the principle of *Jones* v. *Mitchell;* but the Editor has forborne to give them prominence in the discussion, because they appear to carry the claim of the heir beyond the limits assigned to it by other decisions. Such is the case of *Cruse* v. *Barley*, 3 P. W. 20, where a legacy payable out of the produce of real estate, and which failed by the death of the legatee before the vesting age, was held to belong to the heir, in disregard of the doctrine now well established, that real estate, given upon a contingency which does not happen, passes under the residuary clause. The cases of *Collins* v. *Wakeman*, 2 Ves. jun. 683, and *Gibbs* v. *Rumsey*, 2 Ves. & Bea. 294, are also decisions in favour of the heir, who was held to be entitled to legacies payable out of the produce of real estate, which, in the former case, had been reserved for a future disposition that was never made, and, in the latter, was illegally given to charity. But, a circumstance which impairs the authority of both these cases is, that the produce of the real was blended with the general personal estate, which has been repeatedly held to form a ground for giving to the residuary legatee of the mixed fund any sum payable out of the produce of the realty, the devise of which fails by reason either of the decease of the devisee in the testator's lifetime or of the illegality of the purpose to which it is devoted; the intention being, according to the words of Sir R. P. Arden, in *Kennell* v. *Abbott*, "to make the real estate to all intents and purposes personal:" *Malabar* v. *Malabar*, For. 79; *Durour* v. *Motteux*, 1 Ves. sen. 320, [more accurately stated 1 Sim. & S. 292, n.]; *Kennell* v. *Abbott*, 4 Ves. 802; *Amphlett* v. *Parke*, 1 Sim. 275, [reversed on appeal, 2 Russ. & Myl. 221]; *Green* v. *Jackson*, 5 Russ. 55. This point, therefore, is free from the uncertainty which, in other respects, so deplorably hangs over the relative

Rule where produce of realty and personalty were blended.

General remark on the cases.

claims of the heir and residuary devisee [under the old law], in regard to lapsed and void devises—extending, as we have seen, to the destination of lands of inheritance, the devise of which is void ab initio, (but which, lapsing, *clearly* went to the heir), and also to the destination of a sum of money absolutely and primarily charged on lands, or payable out of the produce of land, in the event of the devise of such sum either lapsing or failing ab initio. It would have been well if the Courts had pertinaciously adhered to the principle, that every devise of land, or of the produce of land, was specific, which would have precluded the reading of a gift of a *residue* of such property, as constituting, in any possible event, a gift of the *whole*. Perhaps the state of the authorities is not such as to render this even now impracticable [with regard, of course, only to wills made before 1838]. The establishment of some general doctrine, resting on a basis sufficiently broad to comprehend all these cases, would be far better than any attempt to draw distinctions between them, which would only tend to perpetuate uncertainty, and with it the litigation which that uncertainty will sooner or later inevitably invite. [See 1 Jarm. Wills, 576—586.]

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Effect where sum was excepted, but not disposed of.

It seems to have been decided, that, where a testator gave, out of the produce of land, a sum of money to a person to be thereafter named by him, and died without making any such nomination, the sum constituted an interest in real estate, which descended to the heir, as the testator had evinced an intention, at all events, that it should not go to the devisee of the residue of the fund, though he had not determined to whom else to give it: *Collins* v. *Wakeman*, 2 Ves. jun. 683; *City of London* v. *Garway*, 2 Vern. 571 (*a*).

[In a very recent case, where a testatrix, by a will made in 1834, gave legacies, directed her executors to sell her real estate, and expressed her intention of disposing of the proceeds by a future will, but did not do so, the Vice-Chancellor of England held that the proceeds of the sale went to the heir: *Flint* v. *Warren*, 12 Jur. 810.]

Lapse of legacy directed to be laid out in land.

Generally speaking, the principles which governed the disposition of lands directed to be sold, applied with equal force in the converse case of money being directed to be laid out in land. These principles would seem to require, that, where the bequest failed by lapse, or by the illegality of the purpose to which it was devoted, the legacy should fall into the residuary bequest, as part of the general personal estate;

(*a*) But, quære whether, in the first of these cases cited, the general personal estate was not, in the first instance, liable to the payment of the monies payable out of the real fund, and whether, in the second, there was not an express alternative gift to the residuary legatees, in the absence of the intended paper?

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and such appears to be the effect of an early case, though the doctrine was not expressly recognised as the ground of decision: *Durour* v. *Motteux*, 1 Ves. sen. 320. But, in another instance, where a sum of money was directed to be laid out in land, to be settled on A. for life, without any farther disposition, the ulterior interest was held to devolve to the heir as real estate, *Fletcher* v. *Chapman*, 3 B. P. C. (Toml. ed.) 1, and not to go as personalty to the next of kin or residuary legatee, by analogy to the rule which entitled the heir, in the converse case of lands being devised to be sold and the produce disposed of for life only. (Vide ante, p. 221.) [But this case, as well as a dictum of Lord Redesdale to the same effect (3 Dow, 207), have been overruled in two recent cases, *Cogan* v. *Stephens*, 1 Beav. 482, n.; *Hereford* v. *Ravenhill*, Id. 481; and this is of course the rule under the new law. See 1 Jarm. Wills, 553, 554.]

DOCTRINE OF CONSTRUCTIVE CONVERSION.

Here it will be convenient to take some notice of constructive conversion, or, in other words, of that doctrine which imparts to property qualities and incidents different from those which belong to its actual state, under the principle of equity, which considers that as done which is agreed or directed to be done.

Lands directed to be sold, considered as personal estate, and vice versâ.

Where a person takes, under a deed or will, property which, by that deed or will, is directed to be converted, he, of course, takes it in the character which the instrument has impressed upon it. Thus, if lands are devised in trust to be sold, and the produce laid out on security as personal estate for the benefit of A. for life, with remainder to B. absolutely; upon the decease of B. his personal representative would be entitled to the produce of the land, subject to the prior life-interest, as part of his personal estate, although the lands should actually remain unsold; while, in the converse case, namely, of money being directed to be laid out in land, to be settled to the use of A. for life, with remainder to B. in fee, the money, though not laid out, would be real estate of B., and, as such, would, at his decease, devolve to his heir or devisee: *Guidott* v. *Guidott*, 3 Atk. 254; *Pulteney* v. *Darlington*, 1 B. C. C. 224; *S. C.*, 7 B. P. C. Toml. ed. 530; *Fletcher* v. *Ashburner*, 1 B. C. C. 497; *Attorney-General* v. *Holford*, 1 Price, 426. [And see the authorities collected, 1 Jarm. Wills, 524; *Simpson* v. *Ashworth*, 6 Beav. 412.]

Conversion must be absolute.

In order to change the nature of property, however, the direction to convert must be absolute. Thus, if a discretion is lodged in trustees to invest money in land or personal security, there will be no conversion in law until there is a conversion in fact: *Van* v. *Barnett*, 19 Ves. 102. And, probably, the requisition of the consent of third persons would be

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held to have the same effect. (See *Thornton* v. *Hawley*, 10 Ves. 129.) But, a devise over, in a certain event (which does not happen), of so much of the land as should remain unsold, has been held not to prevent the prior legatee of the produce of the land from taking it as personal estate, there being no inconsistency in saying that it shall be personalty as to the first taker, and real estate with respect to the second: *Ashby* v. *Palmer*, 1 Mer. 296, more fully from MS. 2 Jarm. Pow. Dev. 64; [stated also 1 Jarm. Wills, 527]. See also *Crabtree* v. *Bramble*, 3 Atk. 680.

Heir takes land as personalty, when.

Land directed to be sold will sometimes be personal estate, even in the hands of the heir, though his claim must originally attach to it in the character of real estate. The distinction seems to be, that, where the disposition for the purposes of which the conversion is directed to be made *wholly* fails, the property is real estate of the heir, and, on his decease, would devolve to his real representative; but, where there is a partial failure only of those purposes, as, where the heir takes by lapse, or otherwise, an aliquot share, or an interest ulterior to that of a legatee for life, the property forms part of his personal estate; since the conversion directed by the will would still be required quoad the other undivided share or the interest for life, in respect to which the will takes effect: *Wright* v. *Wright*, 16 Ves. 188; *Smith* v. *Claxton*, 4 Madd. 484.

Person entitled may elect to take property in its actual state.

It is in the power of any person absolutely entitled to property which is directed to be converted, to elect to take it in its actual, as distinguished from its destined state. For this purpose, of course, it is necessary that the party should be personally competent to change the nature of the property, and should have evinced an intention to do so. What acts have this effect has been the frequent subject of adjudication. Entry upon and the letting for a term of years of an estate devised to be sold, would clearly be an election to take it as land: *Crabtree* v. *Bramble*, 3 Atk. 680. And, placing out on security, as the absolute property of the party, money which was directed to be laid out in land, would evince an intention to treat it as personalty: *Lingen* v. *Sowray*, Pre. Ch. 400, 1 P. W. 172. And, in either case, a will or other instrument disposing of the property, by an express description adapted to its actual condition, would, of course, determine its constructive character accordingly: *Triquet* v. *Thornton*, 13 Ves. 345.

What amounts to election.

Whether parol declaration sufficient.

It appears, in one instance, to have been decided in conformity to a dictum of Lord Macclesfield in the case of *Edwards* v. *Countess of Warwick*, 2 P. W. 173, that the election may be made by parol; *Chaloner* v. *Butcher*, cit. 3 Atk. 685; though the contrary was

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asserted by Lord Hardwicke in the case of *Bradish* v. *Gee*, Amb. 229. At all events, the intimation of intention, by whatever means made, must be explicit and unequivocal; *Stead* v. *Newdigate*, 2 Mer. 531; and, therefore, one may be permitted to doubt whether Sir W. Grant, in the case of *Triquet* v. *Thornton*, 13 Ves. 345, was fully warranted in holding that a bequest of the residue of the testator's personal estate, in possession *or reversion*, demonstrated an intention to bequeath, as personalty, a reversionary fund impressed with the character of real estate, on the ground that the testator had no other reversionary personal estate, seeing that a bequest of this nature extends to after-acquired personal estate; so that the circumstance of the testator possessing no other reversion when he made his will, raises no necessary implication that he had this or any other particular fund in his contemplation. [As to the question where the obligation to lay out and the right to call for the money meet in the same person, see *Chichester* v. *Bickerstaff*, 2 Vern. 295; and *Pulteney* v. *Darlington*, 1 Bro. C. C. 223, 7 Bro. P. C. (Toml. ed.) 530, in which Lord Thurlow said, after referring to many cases: "The use that I make of these cases, notwithstanding the dicta they contain, is this,—that where a sum of money is in the hands of one, without any other use but for himself, it will be money, and the heir cannot claim; like the case of *Chichester* and *Bickerstaff*, against which I think there is no judgment, though there are a number of opinions. I know no better authority than that case." And see 1 Jarm. Wills, 535, n. (*k*).]

Conversion of residue.

The consideration of what is the nature of residuary property, as it regards the relative rights of particular and ulterior legatees, forms an important branch of law connected with the duty of executors; and as the doctrine has received much elucidation from modern cases, a statement of it in this place may be useful. The following propositions (*a*) embrace the adjudicated points:—

Rule where a general residue is bequeathed without a trust for conversion.

1st. That where a general residue is bequeathed to a person for life, and after his death over to another, though there is no express trust for conversion, if any part of the residuary estate consists, on the one hand, of property which is wearing out and diminishing in value, as leaseholds, or life or other terminable annuities, or, on the other hand, of property which yields no present income, but the value

(*a*) [Mr. Jarman, in his Treatise on Wills, Vol. I. pp. 541 et seq., has altogether recast his observations on this subject: first deducing five rules from the cases where conversion is directed, and then considering how far the rules deduced apply to cases in which the residuary clause contains no express trust for conversion.]

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of which is constantly progressive, as reversions, the property is not in either case to be considered as intended for enjoyment *in specie*, according to the respective interests of the parties under the bequest, but ought to be converted. It is obvious, that, to pay a terminable annuity to a legatee for life is to give him part of the capital, since every payment is in part an ademption of capital; an annuity being in fact nothing else than a gross sum distributed into annual portions; while, to delay the sale of a reversion, is, in effect, to vest an immediate benefit in possession in the legatee in remainder, who derives, in the growing value of the reversion, the only present enjoyment of which the property is susceptible. It is therefore tantamount to applying the income as an accretion to the capital.

Howe v. *Dartmouth.*

A leading authority on this subject is the case of *Howe* v. *Earl of Dartmouth*, 7 Ves. 137, where a testator bequeathed, inter alia, all the residue of the personal estate to his wife for life, and then to his sister Lady A. for life, and afterwards to the eldest son of B. The wife died in the testator's lifetime. Lady A. filed a bill for an account of the personal estate, and was declared to be entitled to the clear residue for her life, and the income of which she received until her decease. It afterwards appeared, that part of the property consisted of 4,320*l.* Bank Stock, 9,572*l.* per annum Long Annuities, and 750*l.* per annum Short Annuities. On a revival of the suit after Lady A.'s death, it was insisted by B. that she had received, for interest and dividends accrued on the Bank Stock and the Long and Short Annuities, more than she was entitled to, if those funds had been sold, as they ought to have been, immediately after the testator's decease, and the produce invested in the Three per Cent. Consols. Lord Eldon directed an inquiry, founded upon this principle. His Lordship considered it to be clear, that the Court would have directed the conversion of the Bank Stock and Long Annuities into Three per Cent. Consolidated Annuities, which therefore ought to be considered for all practicable purposes as actually done; for what the Court would decree, it expected trustees and executors to do, and would protect them in doing; and the fact of its not being done ought to give no advantage to the tenant for life. His Lordship observed, "If the Court has ever attended to the difficulties often thrown before it, with regard to perishable property of other kinds, as leasehold estate, &c., it never has as to stock. You can learn the price at which it might be converted on any day: and the moment the Court was ordered by the Legislature to lay out its funds in stock, it necessarily held, that for this purpose stock must always be considered of the same value. It is for the benefit of the creditor, that it should be thrown into a

Income arising from Long Annuities and Bank Stock, held not to belong to legatee for life.

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lasting fund; and it is equal to all the parties interested. As to Bank Stock, the Court has ordered 4 per Cents. and 5 per Cents. to be sold and converted into 3 per Cents., upon this ground, that, however likely or not that they may be redeemed, the Court looks at them as a fund that is not permanent, though it may remain for ever; and considers that, from that quality, there is an advantage to the present holder, who gets more interest, because they are liable to be redeemed. I do not know, whether the reasoning is as just in practice as it is in theory. Property cannot be laid out by this Court in Bank Stock in the execution of a trust to lay it out in Government securities, for it is not a Government security. Converting that, therefore, the executors would have done what this Court would have ordered; and that falls under the same consideration; and the advantage, if any, ought not to accrue to the tenant for life. The account therefore must go as to that, as well as the Long and Short Annuities, from the time at which it would have been converted, if the observation of the Court had been drawn to the fact, that the executors were possessed of those funds."

Bank Stock not a Government security.

Posthumous profit of partnership trade held not to belong to legatee for life.

So, in the case of *Fearns* v. *Young*, 7 Ves. 549, where the question was, whether the testator's widow, to whom he had bequeathed "the interest of one half of his property for her life," was entitled to a moiety of the profits of the testator's share in a partnership concern, which, by the stipulations of the articles of partnership, was to be carried on for several months after his decease, and the testator's share of capital and profit was to be paid by the surviving partners to the deceased partner's representatives, by equal instalments, at the expiration of one and two years after his decease. The Master had reported the widow to be entitled to one moiety of the whole of this posthumous profit; but Lord Eldon allowed an exception to the report. "In this case," said his Lordship, "I think the defendant (i. e. the widow) ought to have, from the death to the termination of the partnership, interest at a given rate, and not the profit; and then, at the end of the partnership, the capital, by the articles, was a dead fund, in moieties for one and two years: but she is not therefore to be deprived of interest upon it, but is entitled to interest upon the capital, though dead; with reference to the circumstance, that one half is not to be collected till the end of one year, the other not till the end of two years, calculating what was then the value of the sums respectively: for instance, the value of 1000*l.* payable at the end of one year, and another sum of 1000*l.* payable at the end of two years." His Lordship seems to have had much doubt whether the widow's interest was to commence immediately at the death, or at the expiration of a year;

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but he decided that it commenced immediately; which accords, as we shall presently see, with the doctrine of the late cases of *Angerstein* v. *Martin*, 1 Turn. 232; *Hewitt* v. *Morris*, Id. 241; and *Dimes* v. *Scott*, 4 Russ. 209, which have confined the application of the rule, postponing the enjoyment to the end of the year, to the special case of a trust to convert, *with a superadded direction to accumulate the income in the mean time.* [See 1 Jarm. Wills, 541 et seq., and Hayes & Jarm. Con. Wills, 3rd ed. pp. 224 et seq.]

Posthumous profit of farming stock held not to belong to legatee for life.

The principle in question of course applies, with increased force, where the property is subjected to an express trust for conversion. Thus, in the case of *Gibson* v. *Bott*, 7 Ves. 91, where a testator bequeathed all his personal estate to his executors, upon trust to sell and convert into money all such parts as should not consist of money or stock in the public funds, and upon trust to place out such part of his estate as should consist of money, or be afterwards got in, upon Government or real securities; and that they should stand possessed of the monies already invested, and of the investments to be made, in trust to pay the dividends and interest to his two daughters for life, and then in trust to divide the capital among their children. The testator died in April. Part of the property consisted of leasehold estates which could not be sold on account of defects in the title; also of a farm partly let, and partly in hand, held by lease for thirty-nine years; and of farming stock. The executors managed the farm until the Michaelmas following the death, and then sold the live stock and crops. The legatees for life claimed the whole profit arising from the stock, and the rents of the leasehold from the death. Lord Eldon—"With respect to the live stock, it is not all clear gain. The increase of the animals is contributed at the expense of the estate upon which they live. A man would buy a sheep or a cow upon speculation of improvement, in their condition and by their producing lambs or calves, and the expense between April and Michaelmas. The difference to be taken would be, not between the price at April and at Michaelmas, but with reference to the profit made by keeping them for that period, and the sum that would have been given in April by a man who looked to that profit. The question is, whether the Court must not put upon the direction to sell as soon as conveniently can be, some practical construction, that, five times in ten, will do justice, and five times will not, or whether there may be found some practical rule in the circumstances of each case that will do justice. As in *Sitwell* v. *Bernard* (*a*), I must cut

(*a*) 6 Ves. 520.

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the difficulty. In that case the estates were subject to incumbrances. One estate was covered by a mortgage, requiring a suit; to another no title could be made. If I had picked out particular parcels, and determined how soon each might be sold as soon as conveniently could be, I must have applied a different rule to each parcel. So, as to the money; some was in the East Indies, some was due from persons who would pay, some from persons who would not. But I was obliged to take some rule; which, if it could be avoided, would, I admit, be wrong: and I took the end of a year after the death. So, in the common case of debts and legacies, the same rule is applied to cases where the debts cannot be arranged for ten years, and where there are no debts, and the property is immediately tangible in the funds. If you contend, not for a general rule, but for some rule resulting out of the particular circumstances of this case, you must go this length: that, if the cows calved, and the ewes lambed between the testator's death and his funeral, the person entitled for life must have the whole; or inform me, how I am to take the proportion for the three days that they must be upon the farm. Has the Court ever adopted, in the case of a testator having a leasehold estate in his own occupation, the rule suggested, ascertaining the clear profit, and making a rest at the death? Every such case is an authority to the contrary. The point is, what is advantageous, not to the sole owner of the property, but to all persons interested; and as to that, regard must be had to what, in such case, is practicable. The course is an account, and the tenant for life to take the interest from the end of the year. In every case it is hard that he should lose the interest for that year. According to this, there must be a special direction in every case where there is leasehold property; and he would have the whole profit for that year. If leasehold estate is given eo nomine to A., remainder to B., it must be enjoyed as given; but, if it is to be converted with all convenient speed, these words never require it to be sold the very next day. Where those words occur as to legacies, interest is never given till the end of the year. The Court is obliged to take a general rule, as it is impossible to make the inquiry in every particular case. Suppose the testator directed his executor to convert the property with all convenient speed, to pay certain legacies, and then gave the interest of the residue for life, remainder over, the legatees could make no complaint till the end of a year; and yet their claim would be paramount to that of the tenant of life."

Rule where estate is to be converted, and

2. The next general rule is, that, where property is given subject to a trust for sale and conversion, and the produce is to be invested

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for the benefit of legatees for life and ulterior legatees, and until the sale and conversion *the income is expressly directed to be accumulated* in augmentation of the capital; the trust for accumulation ceases, and the right of the legatee for life commences *at the end of a year from the testator's death*, though the property remains actually unconverted: *Sitwell* v. *Bernard*, 6 Ves. 520, and cases cited, Ib. 528; [*Kilvington* v. *Gray*, 2 Sim. & Stu. 396; *Vickers* v. *Scott*, 3 Myl. & Kee. 500.]

produce in the mean time accumulated.

Where there is no disposition of the interim produce.

3. That in the case just stated, if there be no direction to accumulate, or any other express disposition of the interim produce of the property to be converted, the right of the legatee for life of the invested fund commences, independently of the fact of the actual conversion of the property, or of the greater or less facility or opportunity which existed for the conversion of it, *immediately on the death of the testator: Angerstein* v. *Martin*, Turn. & Russ. 232; *Hewitt* v. *Morris*, Id. 241; *Dimes* v. *Scott*, 4 Russ. 209; overruling *Stott* v. *Hollingworth*, 3 Madd. 161. See also *Taylor* v. *Hibbert*, 1 Jacob & Walk. 308; [*La Terriere* v. *Bulmer*, 2 Sim. 18; *Douglas* v. *Congreve*, 1 Kee. 410.]

Principle of the doctrine of the preceding propositions explained.

The principle upon which the doctrine contained in the two last propositions is founded, is, that what ought to have been done is considered as actually done; and then, by the necessary consequence of this principle, the legatee is entitled, not to the income of the property in its unconverted state, but to the income which it would have yielded if the conversion had taken place, and the proceeds had been invested pursuant to the trusts of the will. In no other way, indeed, could the legatees claim anything before the actual conversion of the property, as they must necessarily take what is given to them, if at all, in that character which the trust, under which they claim, has impressed upon it. It is important to observe, that the doctrine in question applies not only to interests, in which time produces decay or diminution of value, but extends to those which are not of this perishable character. In fact, it is quite immaterial whether the residuary estate has received an accession or sustained a loss by the postponement of the conversion, or whether the unconverted property yielded a greater or less annual income than the invested fund would have produced, so as to make the rule detrimental or beneficial in its result to the legatee for life. The Court has only to see that conversion is the object of the testator, and it then reads the will as producing, at the instant of his death, as between the parties claiming under it, the conversion which it directs, though the sum to be payable to the legatee for life until the conver-

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sion of the fund will depend upon its actual produce, when so converted, or, if the conversion be delayed beyond a year, upon its value at that period, and not (as the principle in question pursued to its full extent might seem to require) on the value at the death.

The consequence of this doctrine is, that if executors, finding the testator's property to be invested in a fund yielding large interest, allow it to remain on that security, the legatee for life is not entitled to the actual income, but only to so much as would have accrued if the fund had been converted and the produce invested in the proper fund at the expiration of a year from the death of the testator, such income commencing not from the end of a year, but immediately from the death. And the rule is not affected by the circumstance that the sole fund yields as much as it would have yielded at the end of the year, or that, in consequence of the depreciation in the purchased fund, it purchases more of the latter than it would then have purchased. These circumstances occurred in the case of *Dimes* v. *Scott*, 4 Russ. 195, where a testator bequeathed all his ready money, securities for money, and all other his personal estate and effects to trustees, upon trust to convert the same into money, and thereout to pay his debts, and to stand possessed of the residue in trust to place out and invest the same at interest on Government or real security, and pay the interest to his wife for life; and, after her decease, to stand possessed of the principal for E. W. Part of the testator's property at the time of his death consisted of 2000*l.* invested in the East India Company's decennial loan, which was a transferable fund, bearing interest at 10*l.* per cent., and redeemable in ten years, with a power in the Company to postpone the payment two years longer on certain terms. The 2000*l.* invested in this loan remained on the security eleven years after the death of the testator, when it was paid off, and the produce laid out in 3*l.* per Cents. The executor paid the 10*l.* per cent. during all this time to the widow. E. W. now filed a bill against the personal representatives of the executor, (who was dead), and the widow, charging that the testator's interest in the loan ought to have been sold, and the principal invested for the benefit of the testator's estate, and praying that the defendants might be charged in respect of the interest received; and a decree was made conformable to the prayer of this bill. Lord Gifford, M. R.—"One principle of the Court is, that, where a testator gives a residue to a person for life, with remainders over, property comprised in that residue, being of a perishable nature, so that the corpus is becoming of less value from year to year, must be converted. Another principle is, that if the residue comprises pro-

Executor charged with excess of income paid to legatee for life.

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perty of a reversionary nature, that, too, must be converted. The one rule protects the remainderman; the other protects the tenant for life. But this is the first case where the corpus, remaining imperishable, has produced, for a limited time, a larger interest than it would have yielded had it been laid out in England. Here the principal was secure; but it was lent out in a foreign country at a higher rate of interest than could have been obtained at home. The question is, should the excess of interest thus obtained be applied to increase the corpus of the fund? By the terms of the decennial loan, the securities are transferable, so that it was competent to the executors at any time to have converted it into money. At first, I was struck with the difficulty and harshness of compelling executors, who find property of their testator lent out at a higher rate of interest than could be gotten here, to invest it in the 3*l.* per Cents. But, on looking at the cases of *Fearns* v. *Young*, and *Howe* v. *Lord Dartmouth*, and the strong language used by the Lord Chancellor in deciding them, I think myself bound, though the present case is a very hard one, to apply to it the rule which he has laid down. I must say, that these payments to the tenant for life were an improper application of the trust-monies. It was argued, that, whatever might have been the rule if the legatee in remainder had applied immediately, what the executors had done could not be considered as a breach of trust, which ought to affect them at this distance of time. But the language of this will is imperative. The executors are expressly directed to convert the personal estate into money, which they are to invest in Government or real securities. It is not left to their discretion how they are to act. There is a positive injunction given to them to realise the propery. It was the duty of the executors to have sold this debt due from the East India Company, and to have invested the money in the 3*l.* per Cents.; then the tenant for life would have received only the dividends which the stock so purchased would have produced; and I must, therefore, disallow (though reluctantly) these payments to her, so far as they exceeded the dividends on that amount of 3*l.* per Cent. stock."

An appeal to the Lord Chancellor was made from the decision at the Rolls; and it having been discovered, that, in consequence of the low price of the 3*l.* per Cent. Consols at the time of the actual investment, more stock was obtained with the produce of the fund in question than it would have purchased at the time the investment ought to have been made, the defendants claimed the benefit of this circumstance. But Lord Lyndhurst, in affirming the judgment of the

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Master of the Rolls, decided against the defendants on this ground also. "It is said," observed his Lordship, "that if the subscription to the decennial loan had been sold, and the produce invested in stock at the end of a year from the testator's death, the sale would have been much less advantageous to the estate than the course which has been actually followed; and that, if the executor is to be charged for not having made the conversion at the proper time, he ought, on the other hand, to have the benefit of the advantage which has accrued from his course of conduct. The answer is this:—With respect to the principal sum, at whatever period the subscription to the decennial loan was sold, the estate must have the whole amount of the stock that was bought; and if it was sold at a later period than the rules of the Court require, the executor is not entitled to any accidental advantage thence arising. As to the payment to the tenant for life, the executors are entitled to have credit only for the sums I have adverted to, namely, the dividends on so much 3*l.* per Cent. stock as would have been purchased with the proceeds of the subscription to the decennial loan, if the conversion had taken place at the proper time. On the other hand, he is chargeable with the whole of the difference between the amount of those dividends and the amount of the sums which have been received in respect of interest on the money which was contained in the decennial loan. I think, therefore, that the judgment of the Master of the Rolls must be affirmed."

It was then submitted, that the tenant for life was entitled to the actual interest produced by the investment in the decennial loan till the time when it was the duty of the executors to have converted it, namely, till the end of the first year from the testator's death; and, therefore, that the executors ought to be allowed in their accounts the extra interest received in respect of that year. It was admitted, on the other side, that, according to the principle of *Angerstein* v. *Martin*, and *Hewitt* v. *Morris*, the tenant for life was entitled to the income of the residue, not merely from the end of the first year after the testator's death, but from the time of his death. The income, however, during the first year, was to be measured in the same way as during any subsequent year, and could therefore amount only, so far as the share in the decennial loan was concerned, to the dividends on the 3*l.* per Cent. stock, which, at the end of a year from the testator's death, might have been purchased with the proceeds of that share. The Lord Chancellor:—"During the first year after the testator's death, the tenant for life is entitled not to the interest on the decennial loan, but to the dividends on so much 3*l.* per Cent.

stock as would have been produced by the conversion of the property at the end of that year."

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In order to determine what sum is payable, according to the doctrine of this case, to the legatee for life in respect of any particular fund or property, which formed part of the residuary personal estate of a testator, it would be incumbent on the trustee to ascertain its value at the end of a year from the death of the testator. The mode of ascertaining such value will, of course, depend upon the nature of the property in question. If it be a leasehold house or personal chattel, actual valuation will be requisite. If it be a public transferable security, a reference to the market price of the day will give the required information. The value of some species of property is scarcely ascertainable by any other standard than its actual production; of this nature, it is obvious, are credits and private securities. Suppose, for instance, a sum of 2000*l.* to be owing to the testator at his decease, which at that time was considered to be a good debt, but on which the executor eventually received only ten shillings in the pound, and that not until two years after the testator's decease. The estimated value of the debt for the present purpose would be the 1000*l.* received, less 40*l.* the interest for the second year which elapsed before it was received. The result, therefore, would be the same as if the testator had died possessed of the sum of 960*l.* cash. It should be observed, however, that if the value of property of any description, at the end of the year, can be ascertained to differ from the amount which it subsequently produced, the former, and not the latter, will regulate the sum payable to the legatee. Thus, if the testator was possessed of Bank Stock, which, according to the market price twelve months from his death, was worth 210*l.* per cent. sterling, but which, afterwards, was sold at the price of 150*l.* only, the legatee for life would, in the mean time, be entitled to consider its value as 210*l.*, without regard to the lower price which it subsequently sold for. The exact point here suggested did not arise in *Dimes* v. *Scott*, because the sum produced by the Indian stock, when sold, was not different from that which it would have produced if the sale had been made immediately on the expiration of the year; but the principle was followed in regard to the British stock to be purchased for investment, inasmuch as the executor was allowed credit only for the dividends on the stock which might have been purchased at the year from the death (*a*), and not on what actually was after-

Remarks upon the case of *Dimes* v. *Scott*.

(*a*) So that the comparatively high price of stock at this period actually operated to the disadvantage of the executor, by increasing the sum for which he was responsible, (*i. e.*), the amount of the excess of his payments to the

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wards purchased. It would seem, therefore, to follow, that a similar rule is applicable as to the converted fund.

Duty of a trustee in regard to constructive conversion detailed.

But though, in this point of view, it would not always be necessary to wait for the result of the actual conversion of any particular fund, in order to see what payment is to be made to the immediate legatee, yet the clear residue must be ascertained before it could be known whether he was entitled to anything; for, of course, he could not claim the income of funds, which, for the time being, belonged to the estate, but which did not eventually form part of the residue, being absorbed in the payment of debts or pecuniary legacies. In accordance with this rule it was lately decided, that interest arising during the year following the testator's decease, from funds which at the end of that year were applied in payment of pecuniary legacies, formed part of the capital of the general residue, and was not to be considered as income to which the legatee for life was entitled: *Amphlett* v. *Parke*, 4 Russ. 75.

Having ascertained, by the means that have been suggested, what is the clear value, at the expiration of the year following the testator's decease, of the property which passed by the residuary bequest, the trustee will simply have to turn this amount into 3*l.* per Cent. Consols, according to the market price at such period (assuming the trust not to exclude that species of investment), *and give the legatee for life credit for the dividends which, from time to time, would have accrued on such stock, if it had been purchased on the day of the testator's decease, setting off against this amount the sums which, from time to time, were actually invested* (*a*). The nature of the task, which the doctrine of the case of *Dimes* v. *Scott* prescribes to executors and trustees, has been detailed with minuteness, because it differs so much from ordinary notions and proceedings, that persons in this situation cannot be too fully informed of what their duty is, or too strongly impressed with the necessity of adhering to it.

Effect of words apparently giving a discretion as to the time of conversion.

And it is not too readily to be assumed, that the rule in question is superseded by words which might appear to give to the trustees a discretion as to the time and manner of the conversion of the property. Thus, in the case of *Walker* v. *Shore*, 19 Ves. 387, where real estate was devised to trustees in trust to be sold, "at such time and in such manner as they shall think proper," Sir W. Grant, M. R.,

legatee for life. No case could present stronger circumstances of hardship. It reads an instructive lesson to trustees.

(*a*) This proposition supposes the conversion not to take place till after the end of a year; for if it be made at an earlier period, the actual produce, and not the value at the year's end, would regulate the payment to the legatee for life.

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observed, "Even under words of such apparently large discretion, it would be necessary to decide upon the respective rights of the tenant for life and the remainderman by some fixed rule, and to hold the conversion to have been made at some given period, *just as much as if the trustees had been directed to sell with all convenient speed.*" The point, however, did not arise, as the cestui que trust for life, the party who complained of property not having been converted in due time, was held to have sanctioned the antecedent delay by the execution of a deed consenting to a farther postponement of the sale. And it is to be observed, that, even where there is a trust for conversion, the residuary legatee for life is entitled, from the time of the testator's death, to the income of any part of the estate, which, at the time of his death, was actually in that species of investment in which the proceeds of the converted property are directed to be laid out. Thus, where a testator directs his real and personal estate to be sold, and the produce invested in Government or real security, the income of which he gives to A. for life, and after her decease to other persons, the legatee for life will be entitled to all the dividends or interest accruing, as well during the first year after the testator's death as subsequently, on any sums which at the time of the testator's death happen to be invested in proper Government or real security: *La Terriere* v. *Bulmer*, 2 Sim. 18.

As to residue not expressly directed to be converted.

Some doubt may exist how far the principle under consideration applies to the case of a residue bequeathed to a person simply for life, and then over, without any express trust for conversion; at least in regard to property not of a temporary or perishable nature, as Long Annuities, &c.; for, to interests of that kind, the cases of *Howe* v. *Earl of Dartmouth*, and *Fearns* v. *Young*, conclusively shew that it *does* extend, [unless (for the recent cases, we shall presently see, require this qualification) the testator, in carving out the interests of the respective legatees, has described the subject of it in such a manner as to shew that he meant them to take the property in its actual condition.] In regard to all other property remaining in specie, the legatee for life will be entitled to the actual income, unless every residuary bequest can be considered as implying a trust for conversion; in which case the enjoyment of the legatee for life must be regulated by the principle of *Dimes* v. *Scott*. Some passages in Lord Eldon's judgment in *Howe* v. *Earl of Dartmouth*, certainly shew his Lordship to have considered that there was no obligation on an executor to convert the entire residue so bequeathed; for he expressly points out the distinction between Bank Stock, which ought to be converted into 3*l*. per Cents., and real securities, of which the

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executor might with propriety postpone the conversion. "The Court would not," his Lordship said, "permit a real security to be called in, without an inquiry, whether it would be for the benefit of every person; *and it is accident, that some part of the assets will produce more interest than a genuine trust security.* In some instances, there is little doubt, it may be not only for the benefit of the tenant for life, but for the substantial interest of the remainderman, that the property should not be shifted from a good real security."

The opinion of Lord Eldon was, therefore, not only that the executor might, and in some cases ought, to leave undisturbed an investment on good real security, but also (which is more immediately applicable to our present purpose), *that, until the money was called in, the income arising from the investment would belong to the legatee for life*—a position which completely negatives the application of the principle of *Dimes* v. *Scott* to such cases.

In several recent cases, a residuary legatee for life has been held to be entitled to the income of property of a wasting nature; the ulterior subject of gift, and the intermediate interest of the cestui que trust for life being respectively described in terms applicable to the present condition of the property in one instance, accompanied by the strongly corroborating circumstance of there being an express direction to convert part of the property at the decease of the cestui que trust for life, which conclusively shewed that the testator did not mean to create an immediate trust for sale of the whole.

Thus, in the case of *Alcock* v. *Sloper*, 2 Myl. & K. 699, where a testator devised and bequeathed all the residue of his estate and effects to his executors, upon trust to permit his wife to receive the rents, profits, dividends, and annual proceeds thereof for her sole use, her own receipt to be a sufficient discharge for the rents and dividends; and after her decease, upon trust to sell his freehold house in O., and his leasehold houses by auction. And it was his desire that E. A. should be employed as auctioneer to convert the whole of his estate and effects into money. Part of the residuary estate consisted of Long Annuities, and the question was, whether the wife was entitled to the annual proceeds of this wasting fund. Sir J. Leach, M. R., decided in the affirmative; there being no intimation of an intention that any part of the property should be immediately converted by the trustees, who were to be merely passive. And he considered that the term "dividends" had reference to the Long Annuities; and his Honor adverted to the fact that the leasehold property, also a wasting fund, was expressly to be sold after the wife's decease, which shewed that

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he had no general notion of immediately converting the wasting portion of his residuary estate into permanent property.

In the case of *Collins* v. *Collins*, 2 Myl. & K. 703, the same learned Judge arrived at a similar conclusion on a will, in which the indication of intention was less decisive and unequivocal, the words of the bequest being, "I give to my wife, S., all and every part of my property, in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death, *the property so left* to be divided in the following manner." Part of the testator's property consisted of a leasehold messuage held for a term of twenty-eight years, and Sir J. Leach, M. R., considered that the ulterior legatees were not entitled to have the lease sold, but that it was the intention of the testator that his widow should enjoy the leasehold property for her life.

This case seems to go far towards establishing that there is no general rule requiring the conversion of property comprised in a residuary bequest not containing a direction to sell or convert. [See also *Pickering* v. *Pickering*, 2 Beav. 31.]

[In the case of *Crawley* v. *Crawley*, 7 Sim. 427, one question was, in what manner a redeemable annuity of 400*l.*, granted to the testatrix for sixty years, and which the executors had been unable to sell, was to be dealt with. Sir L. Shadwell, V. C., said, that the executors, until they could sell the annuity, must invest the payments of it; and that the interest of the investments would be payable to the tenant for life of the residue, and the capital would form part of the capital of it.]

[In the case of *Mills* v. *Mills*, 7 Sim. 501, where a testator gave all his freehold and leasehold messuages, lands, and hereditaments, ready money, securities for money, stock in the public funds, goods, chattels, and effects, and all other his real and personal estate and effects, to trustees, in trust to pay the rents of his freehold and leasehold estates, and the dividends, interest, and proceeds of his money in the funds, and other his said personal estate, to his daughter for life, and, after her death, to stand possessed of his said freehold and leasehold estates, money in the funds, and all other his said real and personal estate, for the children of his daughter; and in default of such children, in trust to pay the rents of his said freehold and leasehold estates, and the dividends, interest, and proceeds of his said stock in the funds and other his said personal estate, to his nephews for their lives, and, after their deaths, in trust to stand possessed of his said freehold and leasehold estates, money in the funds, and other his said personal estate, for their children; and, in default of such children,

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he gave his said freehold and leasehold estates, stock in the public funds, and all other his said real and personal estate, to the corporation of Salisbury, in trust, as soon as conveniently might be after they should come into possession thereof, to sell his said freehold and leasehold estates, and also to sell, call in, and convert into money his said stocks in the public funds, and all other his said personal estate, and to lend the same to certain persons upon the terms therein mentioned. The testator, at the date of his will and at his death, was possessed of leasehold estates, turnpike securities, Bank Stock, and other personal estate. It was contended that the words used being not "stock in the *Government* funds," but "stock in the *public* funds," would pass the Bank Stock, which was the bulk of the testator's property; and that it was clear from the language of the will, that the property was not to be converted till the bequest to the corporation of Salisbury took effect. But Sir L. Shadwell, V. C., held, that the bequest to the trustees was a general residuary bequest, with a partial enumeration of the particulars of his general residuary estate. His Honor observed, that the words "stocks in the public funds," would not have passed the Bank Stock, and, but for the general words, it would not have passed at all; and that it did not appear that you could infer any intention that there should not be a sale and conversion into Three per Cents., according to the rule of the Court, merely because, when the testator speaks of the period when, of necessity, there must be a conversion into money for the purpose of making the loans, he declares that the corporation, when it comes into possession of the residue of his freehold and leasehold estates, stock in the public funds, and all other his said real and personal estate, shall sell and convert the same. His Honor said, that the leaseholds must be sold, and the Bank Stock also; and that, not because it was not a permanent fund (*a*), but because it depended on the will of the directors of the Bank, whether the casual profits or bonuses (which were full as valuable as the ordinary profits) should go to tenants for life, or should form part of the capital of the stock. The tenant for life must refund what she had received more than she would have received if the leaseholds and Bank Stock had been sold and the proceeds invested in the Three

(*a*) ["But Bank Stock is not permanent, the charter being granted for a definite period, at the expiration of which the stock holders will divide all assets:" 1 Jarm. Wills, 551, n. (*o*). In *Trafford* v. *Boehm*, 3 Atk. 440, Lord Hardwicke said, that Bank Stock was not to be considered as a good security, because it depended upon the management of the governor and directors, and was subject to losses; but Bank Annuities were of a different consideration.]

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per Cents.; and there must be an inquiry whether the turnpike securities were real and permanent securities, that is, whether they permanently yielded the interest that was payable on them.]

[But in the case of *Bethune* v. *Kennedy*, 1 Myl. & Cr. 114, where a testatrix, after making two specific bequests of sums in the Long Annuities, gave "the residue of her property, all she did or might possess in the funds, copy or leasehold estates," to her sisters during their lives; and at the decease of both, to be divided equally between her cousins; and the testatrix's estate, after satisfying the specific bequests, consisted in part of 150*l.* per annum in the Long Annuities. Sir C. C. Pepys, M. R., held that the sisters were entitled to receive the dividends accruing on the Long Annuities as a specific legacy. The Master of the Rolls said:—"The question is, whether this gift to the testatrix's sisters, although contained in what, for other purposes, and in point of form, is a mere residuary clause, does not amount to a specific gift of the fund for the benefit of the tenants for life. Against such a construction, it was contended, that the bequest to the sisters was substantially a part of the residuary clause, the effect of which was not to be altered merely because the testatrix had chosen to introduce into it an enumeration of the particular articles of which the residue consisted, and to parcel out the interests of the different persons who were to enjoy it in succession.]

["This question is plainly one of intention, to be collected from a careful examination of the whole scope and context of the instrument; and so it has always been considered. After a specific bequest of a part of the stock which the testatrix had, there is here a gift of all she did or might possess in the funds, copy or leasehold estates, to her dear sisters. Now, as to the copyhold or leasehold estates, it is not disputed that the gift is specific. If so, why should it also not be specific with respect to the funds? The intention, it is reasonable and natural to presume, must have been the same with respect to both descriptions of property; and there can be no doubt that a bequest of all that a testator may possess in the funds would be a specific bequest of all his funded property, the rule being that the legacy is not the less specific for being general.]

True test whether a bequest is or is not specific.

["The true test by which to try whether a bequest is or is not specific, is to inquire what would be the result if there had been pecuniary legacies with a deficient fund, or a necessity for a sale for payment of debts,—to inquire whether or not, in such a case, the bequest would have been protected in a competition with the claims of pecuniary legatees. A party claiming under a gift of all the property that a testator possessed of a specified kind, would not, I

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apprehend, be bound to contribute; and there is nothing in the particular expressions employed in the will under consideration to make a difference in that respect. Upon the terms used in this will, therefore, which, it may be observed, are plainly distinguishable from those which occurred in *Alcock* v. *Sloper*, 2 Mylne & Keen, 699. I am of opinion that this is a specific bequest of a sum invested in the Long Annuities, and to be enjoyed by the tenant for life in the state in which the testatrix left it."]

[In the case of *Johnson* v. *Johnson*, 10 Jur. 279, where the testator, after giving various legacies, proceeded thus:—"And as to the remainder of my property, of whatever nature it may be, I give it to my dear wife, after payment of my debts and legacies, for her use and benefit during her life, and, at her decease, to be given to my children, to be equally divided among them; and, in case of my wife intending to enter into a second marriage, then, before such marriage takes place, I direct that she appoint trustees of my property for the benefit of my children, so that the same be not wasted or made away with;" and the residue of the testator's estates consisted of bond debts, leasehold property, and shares in public companies: V. C. Knight Bruce held, that this was a residue, accompanied by all the consequences of a residuary gift.]

[In the case of *Pickup* v. *Atkinson*, 4 Hare, 624, where a testator, after a specific gift of certain leasehold houses to his wife for her life, she paying the ground-rents and performing the covenants, with remainder over to his nephew, bequeathed the "rents and profits, dividends, and interest," of all the residue of his property to his wife for her life, with a gift over of the whole of the residue, after her decease, to other persons: V. C. Wigram held, that the widow was not entitled to the enjoyment in specie, during her life, of that part of the residue which consisted of leasehold and other perishable property, but that the same ought to be converted. It having been contended that the word "rents" could not be satisfied, if the only property producing rents was to be sold and converted into Consols, his Honor observed:—"If the use of the word 'rents' in one case, with reference to leaseholds not specifically bequeathed, is to be taken as sufficient evidence that the tenant for life of the residue was intended to enjoy the leaseholds in specie, I do not know how to stop short of the conclusion that any other word, by which income may be described, is to have the same effect with reference to the property in respect of which it is paid. The use of the word 'dividends,' for example, in another case, ought to be admitted as sufficient evidence that every portion of the residue, though not specifi-

cally bequeathed, the annual profits of which are returned under the name of dividends, was also intended to be enjoyed in its existing state, which would include every species of property yielding dividends, from Consols, which the Court considers a permanent fund, down to the lowest mercantile security: and the same argument, in strictness, would apply to the word 'interest,' where the property yielded income in the form of interest. It appears to me impossible to admit that conclusion. I think the correct reasoning upon the words 'rents and profits, dividends and interests,' of a general residue, considered alone, must be analogous to that which is applied to the residue itself. The mere enumeration of particulars in the latter case does not give a specific character to the bequest, because the whole clause is, in effect, a mere residuary bequest. I think the same observation applies to a case like this; the enumeration of particulars of income being nothing more than a gift of the income of the residue, which means income only. This conclusion appears to me to be put beyond dispute, when it is considered that the words 'rents, profits, dividends, and interest,' in this case mean rents, profits, dividends, and interest, not of the property the testator then had, but of such property, real, personal, or mixed, as he might happen to have at the time of his death. The same conclusion arises from the words of the gift over, namely, 'the whole of such residue of my said property.']

["The case of *Hinves* v. *Hinves*, 3 Hare, 609, was a very special one, depending upon a number of circumstances which appeared upon the face of the will. *Bethune* v. *Kennedy*, 1 M. & C. 114, was argued and reasoned upon as the case of a specific bequest in the strict sense of the term; although it has been said that the word 'specific' must be understood in a modified sense. In *Collins* v. *Collins*, 2 Myl. & K. 703, the testator gave to his wife, for life, 'his property in every shape, and without any reserve;' and directed the property to be divided after her death. I cannot understand how a direction to divide could help the Court to determine what was to be divided; but I do not think the decision turned upon that. The only two cases which bear any analogy to the present are, *Pickering* v. *Pickering*, 2 Beav. 31, and *Goodenough* v. *Tremamondo*, 2 Beav. 512. In *Pickering* v. *Pickering*, the word 'rents' occurred; but it does not appear to me that the word was relied upon as alone constituting a ground for preserving the property in specie. There are other and very elaborate reasons given for that conclusion. In *Goodenough* v. *Tremamondo*, the word 'rents' occurred twice; and Lord Langdale appears to have thought, that the use of it the second

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time was conclusive evidence that the testator treated his property as unconverted when the estate in remainder fell into possession, and, therefore, that the legacy was specific in the direct sense of that term. And he says further, there was no other property belonging to the testator, except the leaseholds, to which the term 'rents' was applicable; which shews that he considered the bequest as specific in the strict sense of that term. In this case, any property, freehold or leasehold, to which the testator might have been entitled at his death, would satisfy the gift; and that, in my opinion, shews that the testator could not have had any particular object in his mind to which the direction was applicable, but that he referred to the income of his property generally."]

[As to cases in which the property could not be converted, or the parties acquiesced in its not being converted, or from an innocent mistake (though, in truth, some of the cases of the greatest hardship, such as that of *Dimes* v. *Scott*, originated in an innocent mistake,) it had not been converted, see C. P. Cooper t. Cott. 190, n.]

Duty of executor or trustee as to *actual* conversion.

The reader scarcely needs to be reminded, that the doctrine discussed in the preceding pages relates to the *constructive* conversion of property, and not to its *actual* conversion; (i. e.) it ascertains the period at which, for the purpose of fixing the income of the cestuis que trust for life, the property assumes its destined character, but does not prescribe the time and manner of carrying the trust into effect. In short, it simply provides a temporary expedient for preventing the relative rights of the parties beneficially interested from being deranged during the interval which will necessarily elapse before the execution of the trust, leaving the duty of the executor or trustee, in regard to his proceedings in that trust, to be determined by ordinary rules. What degree of activity an executor or trustee is bound to exert, it is not here necessary to inquire, nor indeed would it be easy in any specific propositions to define. Every case must depend upon its particular circumstances. An executor or trustee should, of course, always be prepared to shew that he has performed this among the other duties of his office with diligence; unreasonable delay would expose him to the risk of becoming personally responsible for any loss which that delay might occasion. He should not consider his fiduciary labours as accomplished, until he has completely converted all the property, and placed it in the state which the testator has directed. In the case of *Buxton* v. *Buxton*, 1 Myl. & C. 80, an executor who had delayed the sale of Mexican Bonds for a year and seven months, when they were sold at a price considerably below what they would have fetched at the

testator's decease, was held not to be chargeable with the loss. The trust was to convert with all convenient speed, and there was no purpose requiring an immediate sale, though certain legacies, to the payment of which the produce was applicable, were payable at the expiration of four months, when the price of the bonds was extremely low, even below what was afterwards obtained about six months after the testator's decease. The defendant's co-executrix frequently applied to him to sell; but this, it was held, did not determine or in any manner limit his discretion. It appeared that the defendant had throughout exercised his best care and discretion, and that his delay did not arise from negligence. Sir C. C. Pepys, M. R., said, that if a reasonable discretion were denied to an executor; if it were to be laid down as an inflexible rule that he ought to convert the assets without waiting or considering how far it was for the interest of those who were beneficially entitled, there would, of necessity, be always an immediate sale; the executor would be bound to sell at whatever loss. Such a rule would be in its operation most injurious.

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The same general observations apply to the investments as well as the conversion. It does not *necessarily* follow, because 3*l.* per Cent. Annuities is the fund by which the annual amount to be paid to the legatee for life, before the conversion of the property, is to be measured, that this is the only species of investment which an executor or trustee can adopt; while, on the other hand, it must be admitted, that if the will does not expressly authorise investment upon other securities, it will not be prudent for him to lay out the trust funds in any other; not even in the higher rate of public annuities; the objection to those annuities being, that they are liable to be redeemed by Government at par—a right which of late years has been frequently exercised. The risk of loss, however, on this ground, only exists when the stock is purchased at a premium. The Court of Chancery, it is well known, invariably lays out its funds in the 3*l.* per Cents., considering them as the only permanent stock, and trustees in this, and in every other particular, are expected to assimilate their proceedings as much as possible to those of the Court. Indeed, it is not clear that the ordinary trust to invest on real or Government security, though it enables the trustees to choose either of these two species of investment, gives them any discretion in the selection of Government securities, so as to authorise investment in any other stock than the 3*l.* per Cents. At all events, a cautious trustee would not be satisfied to rest his exemption from responsibility on the affirmative. Trustees often invest in the larger annuities for the sake of increasing the income of the legatee for life; but this is an object

Duty of a trustee or executor as to investments.

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which the Court cannot sanction, and is obviously inconsistent with an impartial discharge of their duty, which requires that they should regard with equal consideration the interest of the ulterior legatee, and the party entitled to the immediate income. The objection in question is not applicable to mortgages and other real securities which do not fluctuate; but unless trustees are expressly empowered to lend on real security, they ought not to adopt even this mode of investment; for, though landed or real securities are not liable to fluctuation in nominal value, they may prove deficient. With respect to personal securities, no observation is requisite, as a trustee would not think of laying out the trust monies in this manner, without the most explicit authority. Vide ante, Vol. 9, p. 703.

Suggestion as to the expediency of enlarging the powers of trustees for sale and conversion.

A consideration of the doctrines discussed in the preceding pages will suggest some particulars in which the forms of testamentary trusts for sale and investment, in general use, are not sufficiently comprehensive.

A trust for conversion and investment, for the benefit of particular and ulterior legatees, should (unless the contrary be intended) invariably be accompanied by a power enabling the trustees to suspend or postpone the sale or conversion of any part of the estate, and by *a declaration, that, in the mean time, the legatee for life shall take the income.* This would relieve trustees from a very onerous and troublesome task, and render their duty consistent with their ordinary mode of acting. It certainly gives them a large discretion, and one which is the more liable to abuse, on account of the bias, before hinted at, commonly felt in favour of the interest of a legatee for life, as contradistinguished from that of the ulterior legatees; but persons who cannot be so far trusted ought not to be appointed to an office, every step in the execution of which demands the union of probity and judgment. Trusts for investment should also authorise the trustees to invest upon other Government security than the 3*l.* per Cents., where this is intended.

It may be observed, too, that where a testator has granted redeemable annuities, an express direction respecting the redemption of them, and providing out of what fund they are to be paid until redeemed, will often be useful in preventing disputes between the persons interested in the annual income and in the capital. The charge clearly ought not to be thrown exclusively upon the annual income, for the same reason that an annuity, which forms part of a testator's estate, is not, we have seen, considered as consisting entirely of annual income, so as to belong to the legatee for life.

Notwithstanding the great length of this section (for which the

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importance of the topics discussed is urged as an apology), it should not be concluded without adverting to the important alteration made in the rights of executors by stat. 11 Geo. 4 & 1 Will. 4, c. 40, intituled, "An Act for making better provision for the disposal of the undisposed-of residues of the effects of testators," and which recites, that, "Whereas testators, by their wills, frequently appoint executors, without making any express disposition of the residue of their personal estate: And whereas executors so appointed become, by law, entitled to the whole residue of such personal estate; and Courts of equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate, under the Statute of Distributions, if the testator has died intestate: And whereas it is desirable that the law should be amended in that respect:"—It is then enacted, "That when any person shall die, after the first day of September next after the passing of this act, having, by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of; unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially."

Stat. 11 Geo. 4 & 1 Will. 4, c. 40.

Executor to be a trustee of undisposed-of residue for next of kin.

Sect. 2. "Provided that nothing herein contained shall affect or prejudice any right to which any executor, if this act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributioms, in respect of any residue not expressly disposed of."

Sect. 3. Act not to extend to Scotland.

It is remarkable, as observed by Mr. Jemmett, in his collection of Sir Edward Sugden's Acts, p. 167, that, about a century ago, Lord Chancellor King introduced into the House of Lords a bill having a directly contrary object, namely, that of affirming the right of the executors to an undisposed-of residue, but which never passed the House of Commons.

The object of the Chancellor, no doubt, in promoting this bill, was to remedy the mischief which, even at that early period, was

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found to be consequent on allowing the executor's right to the undisposed-of residue to be negatived by a legacy to him, and some other equally equivocal circumstances of presumed intention, which introduced much uncertainty, and that frequency of litigation of which uncertainty is ever productive; and, moreover, let in parol evidence to support the executor's legal title against the presumption, a consequence which has been often since deplored. *Any* legislative enactment which put an end to this state of things would have been beneficial; but the act just passed seems to be a more salutary measure than Lord King's, because the rule which gave the residuary property to the executor generally contravened the intention; and the conviction that it did so, induced the Courts to lend too willing an ear to the slightest pretexts for departing from it. See the cases collected, 1 Jarm. Pow. Dev. 499. Of course, the question may still arise, whether the bequest of a residue to an executor carries the beneficial interest. With such a question the act does not interfere,—leaving it to be decided according to the ordinary rules of construction.

WHAT WORDS SUFFICIENT TO CREATE A TRUST.

6. *What Words sufficient to create a Trust.*

Effect of words of recommendation, &c., in creating a trust.

Words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will create a trust for the person or persons in whose favour the testator's intention is expressed, provided he has pointed out, with sufficient precision and certainty, both the subject-matter and the objects of the intended trust.

Thus, in the case of *Massey* v. *Sherman*, Amb. 520, where a testator devised copyholds to his wife, not doubting that she would dispose of the same to and amongst his children as she should please, this was held to be a trust for the children as she should appoint.

So, in the case of *Pierson* v. *Garnet*, 2 B. C. C. 38, 226, where a testator gave his residuary personal estate, in trust for A. for life, subject to certain annuities, and after payment of the annuities, the testator gave the residue to A., his executors, administrators, and assigns, adding, "and it is my dying *request* to the said A., that if he shall die without leaving issue living at his death, the said A. do dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt, A. C., his grandmother, in such manner and proportion as he shall think proper:" it was held by Sir L. Kenyon, M. R., and afterwards by Lord Thurlow, C., that the effect of the will was to create a trust for the descendants in the described event.

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Again, in the case of *Malim* v. *Keighley*, 2 Ves. jun. 333, where a testator, in certain events and subject to certain trusts, bequeathed the residue of her personal estate to her surviving daughter, and such bequest was followed by these words, "hereby recommending it to such daughter to dispose of the same after her own death, and the determination of the several trusts aforesaid, unto and among the children of my daughter A., and my nephew I., desiring that his reputed daughter C. may be considered as one of his children." The surviving daughter died without exercising the power, and Sir R. P. Arden, M. R., held, that a trust was created in favour of the children of the daughter and nephew.

So, in the case of *Birch* v. *Wade*, 3 Ves. & Bea. 198, where a testator, after giving the residue of his real and personal estate in trust for his wife for life, and then in trust for other persons for life, and after disposing of two-thirds absolutely, added—"It is my will and desire, that the other third part of the principal of my estate and effects be left entirely at the disposal of my dear and loving wife among such of her relations as she may think proper." The wife died without making any disposition, and Sir W. Grant, M. R., considered it to be clear that the testator intended that his wife's relations should have the benefit of the disposition. Her next of kin at her death, therefore, were held to be entitled. See also *Brest* v. *Offley*, 1 Ch. Rep. 246; *Eales* v. *England*, Pre. Ch. 202; *Macey* v. *Shurmer*, 1 Atk. 389; *Harding* v. *Glyn*, 1 Atk. 469; *Earl of Bute* v. *Stuart*, 2 Eden, 87; *S. C.*, 1 B. P. C. Toml. ed. 476; *Paul* v. *Compton*, 8 Ves. 380; *Wright* v. *Atkins*, 19 Ves. 299; *Cary* v. *Cary*, 2 Sch. & Lef. 189; *Forbes* v. *Ball*, 3 Mer. 441; *Prevost* v. *Clarke*, 2 Madd. 458; *Horwood* v. *West*, 1 Sim. & Stu. 387.

Expressions which have been held not to create a trust.

But if the testator's language amounts merely to an expression of general kindness towards the objects in question, and does not intimate any definite disposing intention in their favour, as where he adds—"I have no doubt that my wife (the legatee) will be kind to my children," such words are inoperative to qualify the legatee's interest: *Buggins* v. *Yeates*, 8 Vin. Ab. 72, pl. 27. And the same construction has prevailed in some instances in which the indefiniteness was of a less palpable character, as where a testator gave leasehold estates at S. to his brother, J. H., for ever, "hoping he will continue them in the family:" *Harland* v. *Trigg*, 1 B. C. C. 142.

So, the following words added to a residuary gift to the testator's wife, "not doubting but that she will dispose of *what shall be left* at her death to our two grandchildren," were held by Lord Thurlow not to create a trust, on account of the uncertainty to what extent, if

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at all, the testator intended to control the absolute property of the wife: *Wynne* v. *Hawkins*, 1 B. C. C. 179. See also *Eade* v. *Eade*, 5 Madd. 118; but see *Surman* v. *Surman*, Ib. 123.

But where the testator ordered and directed his son Joseph (to whom he gave all his real and personal estate) to take care of and provide for his (the testator's) daughter Anne, during her life—Sir T. Plumer, M. R., was of opinion that the daughter was entitled to have a provision made for her out of the residue, in addition to an annuity of 5*l.*, which was bequeathed to her: *Broad* v. *Bevan*, 1 Russ. 511, n.

Recent cases suggest a doubt whether a similar decision would now be made on such words; for the Courts seem to be sensible that they have gone far enough in investing with the obligatory efficacy of a trust loose expressions of this nature, which, in all probability, are rarely, if ever, intended to have such an operation. Accordingly, we find, of late, a more positive and uniform requisition of definiteness, in regard to the subject and objects in the testator's contemplation, than appears in some of the earlier adjudications.

Thus, where a testator gave all his real and personal estate to his wife, trusting that she would, in love to the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good, remembering always, according to circumstances, the church of God and the poor—Sir J. Leach, V. C., held the wife to be absolutely entitled, the testator's intention evidently being to leave the children dependent on her: *Curtis* v. *Rippon*, 5 Madd. 434.

So, where a will contained the following passage—"I do likewise will and bequeath to my only son, J., the sum of 60*l.* sterling per year for ever; also to provide for the two daughters of my child, H. E., namely, S. E. and E. E.; and the remainder of my property to the two children of my daughter, S. A."—Lord Gifford, M. R., held, that the words in question did not create a trust on the 60*l.* a year, or the remainder of the property bequeathed to the children of S. A., the former being a distinct, independent bequest; and in regard to the latter, though the testator no doubt intended to make a provision for the daughters of H. E., yet the Court had no means of determining what that provision was to be: *Abraham* v. *Alman*, 1 Russ. 509.

Again, where a testator bequeathed the remainder of what he should die possessed of, after payment of debts and legacies, to his dear wife, adding, "recommending to her, and not doubting, as she has no relations of her own family, but that *she will consider my*

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near relations, should she survive me, as I should consider them myself in case I should survive her." In a preceding part of the will, the testator had assigned as a reason for his not leaving his brother and sister any thing, that they were provided for, and that he could not do so without taking from his wife's property, who was more in need of it—Sir A. Hart, V. C., held, that the effect of the whole was, that no trust for the relations was created: *Sale* v. *Moore*, 1 Sim. 534.

So, where the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife, *unfettered and unlimited*, in full confidence and with the firmest persuasion, that, in her future disposition and distribution thereof, she would distinguish the heirs of his late father, by devising and bequeathing the whole of his said estate, together and entire, to such of his said father's heirs as she might think best deserved her preference—it was held in the House of Lords, confirming a decree in the Exchequer, that the wife was absolutely entitled for her own benefit, Lord Eldon considering that the testator intended to impose a moral but not a legal obligation on his wife; for which he relied much (as did also Lord Redesdale) on the words "unfettered and unlimited." Lord Eldon also adverted to the great difficulty of reconciling the testator's direction, that the estate should go "entire," with his direction respecting its distribution: *Meredith* v. *Heneage*, 1 Sim. 542.

Again, where a testator bequeathed certain annuities, to be paid out of any money arising from whatever dividends he might die possessed of in the Bank of England, and the residue of the dividends to his brother, A., (to enable him to assist such of the children of the testator's deceased brother F., as he might find deserving of encouragement), to be paid to the several persons as they became due—Sir L. Shadwell, V. C., decided that the words in the parenthesis did not raise any trust in favour of the children of F.; they merely expressed the motive or cause of the gift; and his Honor commented on other passages of the will, which fortified this conclusion: *Benson* v. *Whittam*, 5 Sim. 22.

And lastly, and still more recently, where a testatrix made a codicil to her will in the following words—"I hope none of my children will accuse me of partiality in having left the largest share of my property to my two eldest daughters, my sole motive for which was to enable them to keep house so long as they remain single; but in case of their marrying, I have divided it amongst all my children. If they die single, of course *they will leave what they have amongst*

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their brothers and sisters, or their children:"—Sir J. Leach, M. R., considered that these words were not intended to create an obligation upon the two eldest daughters; as they applied not simply to the property given by the testatrix, but to all property which the daughters might happen to possess at their deaths, leaving what she gave by her will at their disposition during their lives, and extending to property which might never have belonged to her, and wanting altogether certainty of amount: *Lechmere* v. *Lavie*, 2 Myl. & Kee. 197.

[Where there is considered to be sufficient indication of the testator's intention to create a trust, but the objects of it are uncertain, that is, are not indicated with sufficient clearness, the effect is, that the devisees or legatees in trust held the property for the benefit of the heir or next of kin: *Stubbs* v. *Sargon*, 2 Kee. 255. See also 1 Jarm. Wills, 333, and the cases there cited.]

Remarks upon the cases.

Such is the long train of decisions which have been produced by the neglect of testators clearly to distinguish between expressions which are meant to impose a trust or obligation on the devisee or legatee to whom they are addressed, and those which are intended merely to onerate him with a moral or conscientious duty. After such a statement, it may appear superfluous to enjoin caution in the use of words, which have occasioned so much litigation. If a trust is intended to be created, this should be done in plain and unequivocal terms; and, if not, any expressions of request or exhortation, which the testator may wish to introduce, should be invariably accompanied by an express and unambiguous declaration, that no trust or obligation is intended to be imposed.

Direction to permit tenant to continue in occupation.

[A recommendation made by a testator in a devise to his son, "to continue his cousins A. and B. in the occupation of their respective farms in the county of W. as heretofore, and so long as they continue to manage the same in a good and husbandlike manner, and to duly pay their rents," was held to be a trust for the cousins, who had been tenants at will: *Tibbits* v. *Tibbits*, 19 Ves. 656.]

Direction to employ steward held to be imperative.

[A direction to a devisee to employ a particular steward has been held to be imperative: *Lawless* v. *Shaw*, Lloyd & Goold, 154. An auditor also, appointed by a testator to audit the trustees' accounts during the execution of certain trusts, was held not to be removable arbitrarily by the trustees: *Williams* v. *Contest*, 8 Sim. 349.]

Auditor appointed by testator not removable.

The word "trusting" held to create a trust.

[In the recent case of *Baker* v. *Mosley*, 12 Jur. 740, where a testator bequeathed stock to A. B., trusting that he would preserve the same, so that, after his decease, it might go to and be equally divided between his four children, or such of them as should survive

him, Vice-Chancellor Knight Bruce said, "The word 'trusting' is a word of art, and plainly implies trust. A trust has been created."]

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[In the case of *Johnston* v. *Rowlands*, 12 Jur. 769, Vice-Chancellor Knight Bruce held that the word "recommend" did not create a trust. His Honour observed:—"That the word 'recommend' may amount to as much as the word 'command' in a particular instrument, and may create a binding trust, is certain. It is equally certain that the word is susceptible of a different interpretation, and is susceptible of an interpretation consistent with the legal and equitable power of the person recommended to depart from the recommendation. But it must depend upon the words and the language of each particular instrument in which it is found, in which of the two senses that word is used in a particular case."]

Word "recommend" held not to create a trust.

X. Estates arising by implication.

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[As to the effect of recitals, see 1 Jarm. Wills, 460.]

An heir-at-law can only be disinherited by express devise or by necessary implication, which has been defined to be—so strong a probability that the contrary cannot be supposed; as, where the testator devises to his heir after the death of his wife, it being impossible to suppose that he would do anything so absurd as the making a devise of lands to take effect at a future period to him who would by law take them in the mean time, the wife is held to have an estate for life by implication. See *City of London* v. *Garway*, 2 Vern. 571; *Dyer* v. *Dyer*, 1 Mer. 414. And it is immaterial whether the devise to the heir is in fee or for life, or in tail. See *Philips* v. *Philips*, 1 P. W. 34. But, if the devise is to any person other than the heir, no such irresistible inference arises, because a testator may *possibly* intend to postpone a devise to a stranger, in order that the property in the mean time may devolve to the heir. Accordingly, it is well settled, that if lands are devised after the decease of A. to B., not being the testator's heir-at-law, an estate for life to A. cannot be implied, but the lands descend to the heir during the life of A.: *Faulkner* v. *Faulkner*, 1 Vern. 20; *Aspinall* v. *Petvin*, 1 Sim. & Stu. 544. [See also 1 Jarm. Wills, 465, 466.]

Estate for life implied from future devise to the heir.

The same implication is said to arise from a devise to one of several co-heiresses; as where a man, having two daughters but no son, devises to one of his daughters after the death of his wife, in which case the wife, according to an early dictum, takes an estate for

Devise to one of several co-heiresses.

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life by implication: *Hutton* v. *Simpson*, 2 Vern. 723; see also arg. *Willis* v. *Lucas*, 1 P. W. 472. But this position seems to carry the implication doctrine beyond the scope of the reasoning on which it is founded, since there is no incongruity in a person devising in futuro to *one* of several co-heiresses, intending the property in the interim to descend to *all*. And it is observable, that, in *Willis* v. *Lucas*, 1 P. W. 475, Lord Chancellor Parker avoided expressing any opinion on the point, whether a devise of gavelkind lands to one of several co-heirs raised an implied estate; though he considered it clear, in regard to *other* lands, that the testator had, by giving to the eldest son (i. e. the heir) an immediate annuity out of the land, plainly shewn that he was not to have the land itself.

Annuity to the heir.

It is conceived that the state of the devisor's family at the time of the making of the will, and not its state at the testator's decease, must regulate the application of the doctrine in question. Thus, if a man having two sons devises freehold lands to his younger son in fee, after the decease of his wife, the latter would not take an estate by implication, although in event (i. e. by the decease of the elder son without issue in the testator's lifetime) such younger son might happen to become heir at the testator's death.

[As to a devise to the heir and others after the death of A., see *Blackwell* v. *Bull*, 1 Kee. 176, and Mr. Jarman's observations thereon, 1 Jarm. Wills, 468.]

Distinction where there is an express devise of part.

If the person, at whose decease the devise to the heir is expressed to arise, is an express devisee for life of part of the lands, the words referring to the devise as taking effect at his decease, will be considered to point to that devise, and not as inserted for the purpose of postponing the devisee's enjoyment of the residue. As, where a testator devises Blackacre to his wife for life, and afterwards devises all his lands to his eldest son after the death of his wife, the words will be marshalled, the expression referring to the decease of the wife being taken to apply exclusively to Blackacre; and consequently the ground for raising an implied estate in the wife in the residue of the lands fails: *Simpson* v. *Hornsby*, Pre. Ch. 439, 452, 2 Vern. 722; *Boon* v. *Cornforth*, 2 Ves. sen. 277; *Dyer* v. *Dyer*, 1 Mer. 414; but see *Aspinall* v. *Petvin*, 1 Sim. & Stu. 544. [Mr. Jarman has subsequently further developed this distinction, and has stated in full the cases here cited, together with some additional cases. See his Treatise on Wills, vol. I, pp. 469—474. In the recent case of *King* v. *Inhabitants of Ringstead*, 9 B. & C. 218, stated by Mr. Jarman, all the cases in favour of this, called by Mr. Jarman the distributive construction, were treated as standing on special grounds, and as

constituting an exception to the general rule. See *Drew* v. *Killich*, 1 De G. & Sm. 266.] ESTATES BY IMPLICATION.

The doctrine which raises, from a future devise to the heir, an implied gift of the lands intermediately, supposes that the will does not contain a residuary clause capable of comprehending such intermediate estate, which clause, by disposing of that estate, would, of course, completely exclude the implication. Thus, if a testator devises Blackacre to his heir after the death of his wife, and in the same will devises the residue of his real estate to a stranger, since the estate for life not included in the devise to the heir would, if no implied gift were raised, pass to the residuary devisee, which might possibly be intended, it should seem, that the residuary devisee, and not the wife, would take the estate during her life. Also where there is a residuary devise.

And it is farther observable, that where the will contains a residuary devise, a devise of particular lands to the residuary devisee, to take effect in futuro, gives rise to precisely the same argument in favour of the implication, as a devise to the heir; for instance, where a testator devises Blackacre to his youngest son after the death of his wife, and then devises all the residue of his real estate to his youngest son, to suppose that he intends Blackacre, which he has devised to the youngest son at the death of the wife, to go to him in the meantime under the residuary clause, involves the same absurdity as to suppose that an heir is to take immediately what is expressly given to him at a future period, and therefore the wife would undoubtedly take an estate for life.

[As to implication of devise to survivors, see 1 Jarm. Wills, pp. 475—477.]

Applying to estates tail the principle which governs the implication of estates for life, it is not to be doubted, that, if under the old law lands were devised to the heir in fee, in case A. should die without issue, this would have made A. tenant in tail with reversion in fee to the heir. The reports however, do not present such a case, the implied gifts of estates tail which they supply being of a different nature. According to those cases, if lands were devised by a man to A. in fee in case *his* (the testator's) *eldest son and heir apparent* should die without issue, such son would have taken an estate tail by implication; *Newton* v. *Barnardine*, Moore, 127, pl. 275; *Roe* v. *Vernon*, 5 East, 51; but if the person, in default of whose issue the devise over was to take effect, were *a stranger*, and the devise over was not to the heir, no implied intail was raised, and the devise in question consequently was void as an executory devise to take effect after an indefinite failure of issue: *Gardiner* v. *Sheldon*, Vaugh. 259, 1 Eq. Ca. Ab. 197, pl. 6. Implication of estates tail.

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Cases, however, are not wanting in which estates tail have been implied from a devise to take effect on the indefinite failure of issue of a stranger; but they are not to be relied on as establishing any general rule to this effect, inconsistent as it appears to be with sound principles of construction: *Tenny* v. *Agar*, 12 East, 253; *Romilly* v. *James*, 6 Taunt. 263. See also *Daintry* v. *Daintry*, 6 T. R. 307. [See this subject further discussed, 1 Jarm. Wills, 487—496.]

Effect of stat. 7 Will. 4 & 1 Vict. c. 26, upon the implication of estates tail.

[No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since 1837, unless the intention to denote an indefinite failure of issue be clearly made to appear; for, by the 29th section of the stat. 7 Will 4 & 1 Vict. c. 26, it is enacted, "That in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."]

Mr. Jarman's remarks as to the effect of the new enactment.

[The following are some of Mr. Jarman's observations (1 Treat. on Wills, 496, 498), upon this important alteration of the law:—"Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee-simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt, was the effect contemplated and designed by the Legislature. A different and less desirable result, however, will occur where the prior devise, being expressly for life, will not be enlarged by the statute to a fee-simple; while, on the other hand, the words importing a failure of issue will nevertheless be restricted."]

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["The chief advantage attending the newly enacted mode of construing words importing a failure of issue are,—1st, that it brings all executory limitations depending on such a contingency within the limit prescribed by the rule against perpetuities (supposing, of course, that the person referred to is existing at or before the death of the testator, or necessarily comes in esse within twenty-one years afterwards), which limitations otherwise were, we have seen, void for remoteness; and this was the inevitable result whenever there was not sufficient ground for implying an estate tail in the first taker; in other words, when the person whose issue was referred to took no estate under the will, and neither he nor the express devisee was the heir-at-law of the testator; and, secondly, that by excluding the implication of an estate tail in the person whose issue is so referred to where he takes an estate under the will, or where he or the express devisee happens to be the heir-at-law of the testator, the new construction has the effect of exempting the interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being, that, instead of the ulterior devisee having (as formerly) a remainder in fee expectant on an estate tail in such prior devisee (which of course the latter might have barred by a disentailing assurance), he takes by executory devise engrafted on a preceding fee-simple, to arise on the event of the first devisee dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event. Against these advantages must be set the inconvenience which is consequent on the rejection of the implication of an estate tail in the first taker, where he takes an estate expressly restricted to life, and therefore not capable of being enlarged by the recent act to a fee-simple; in which case the existence of issue at his death produces, as already shewn, a vacancy in the disposition."]

Implication of gifts of personalty.

The same general doctrines which govern the implication of gifts of real estate apply in relation to personal bequests; for, though the rejection of vague and conjectural implications is frequently stated as if it were the result of favour shewn to the *heir*, yet it is clear that equal protection would be afforded to *all* persons on whom the law casts property of any kind which is not disposed of, that protection being nothing more than what is involved in an adherence to the sound axiom, that the disposition of the law shall be defeated only by the unequivocal disposition of the party. Accordingly, we find it laid down in an early case, that, where a man devised a term to his son after the death of his wife, and made other persons his executors, this was but a demonstration when the estate of the son

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should commence, *and in the interim the executors might well have it: Horton* v. *Horton*, Cro. Jac. 74: and see *Rayman* v. *Gold*, Moore, 635, pl. 871.

In direct and avowed opposition to these authorities, however, the Court of King's Bench, of a later day, held, that where A., possessed of a term determinable with the lives of B. and C., bequeathed the same to his daughter A., after the death of his daughter B., during the life of C., B. took an estate for life by implication; *Roe* v. *Summerset*, 5 Burr. 2608; but this decision (which is prominently brought forward whenever a case of implication is attempted to be raised) cannot safely be considered as taking bequests of personalty out of the general doctrine.

The implication would, of course, be warranted where a testator bequeathed a term to A. after the death of B., and then gave all the residue of his personalty to A., since the case admits of the same line of reasoning as applies to a future devise of lands of inheritance to the heir. See *Horton* v. *Horton*, Cro. Jac. 75. [In some cases of a more recent date a tendency has been manifested towards construing generally a bequest of personalty, at the death of A., to give to A. a prior life interest by implication; and this construction prevailed in one instance where there was an express gift to the same legatee determinable during her life. See *Bird* v. *Hunsdon*, 2 Swanst. 342; see also *Blackwell* v. *Bull*, 1 Kee. 176.]

Gifts implied from powers of selection and distribution.

Another species of implied gifts is created by powers of selection or distribution in favour of a defined class of objects; for, where a fund is given to a person for life, and after his or her decease to such children, relations, or other defined objects as he or she shall appoint, or among them in such shares as the donee shall appoint, and there is no express gift over to these objects in default of appointment, a gift will be implied; the presumption being, that the testator could not have intended that the objects of the power should be disappointed of his bounty by the neglect of the donee to exercise it in their favour: *Harding* v. *Glyn*, 1 Atk. 469; *Cruwys* v. *Colman*, 9 Ves. 319; *Forbes* v. *Ball*, 3 Mer. 437; *Walsh* v. *Wallinger*, 2 Russ. & M. 78; [*Brown* v. *Biggs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; in which case the original decree at the Rolls was affirmed there upon a re-hearing, and then, upon appeal, affirmed by the Lord Chancellor]; and the circumstance that the testator has expressly given the property to the objects of the power in a certain event (as that of the donee dying before him), has been held not to negative the implication: *Kennedy* v. *Kingston*, 2 Jac. & Walk. 431. If the subject of the power were lands of inheritance, it would be a question whe-

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ther the implied estate were for life or in fee. There would be strong ground for the latter construction, if the power authorised the limitation of estates in fee. The point was glanced at, but was not raised, in the case of *Casterton* v. *Sutherland*, 9 Ves. 445.

As to implying gifts to children from a gift over in default.

A few other points respecting implied gifts should be noticed. It was formerly doubted whether a legacy to a person, with a bequest over, if he died without children, raised an implied gift in the children. The negative is now clear, as the hypothesis in favour of the children amounts only to conjecture, and not to necessary implication; and, therefore, the effect of the having or leaving a child (as these words may happen to be construed) is no more than to render the interest of the legatee absolute: *Weakley* v. *Rugg*, 7 T. R. 322; *Doe* v. *Wetton*, 2 Bos. & Pull. 324.

Devise over in case of death during minority.

The same considerations would seem to apply where a gift is made to A. during the minority of his son B., *and in case B. shall die under twenty-one*, then over to the other sons of A., without any alternative gift in the event of B. attaining the prescribed age. Though every suggestion of probability is in favour of an intention to give the property to B. at his majority, yet there is some difficulty in obtaining such a result without trenching upon the rules which exclude conjectural interpretations. But, in such a case, the Courts lay hold of every slight circumstance as a foundation for the implication: *Goodright* v. *Hoskins*, 9 East, 306.

Implication from gift to survivors.

A devise to the survivors of several persons, though giving rise to a strong suspicion that the testator must have meant that all should take during their joint lives, seems scarcely to afford that irresistible inference which the law calls a necessary implication; but see *Saunders* v. *Lowe*, 2 Blackst. 1014. [For other cases, in which the implication arising from the whole will was held to be equivalent to a direct gift, see 1 Jarm. Wills, 475, n. (*n*).] So, a gift of an annuity to several persons for their lives and the life of the survivor, has been held not to create a gift to the survivor, but merely to prolong the endurance of the interests of the legatees and their representatives to the decease of such survivor: *Jones* v. *Randall*, 1 Jac. & Walk. 100.

Implication of cross remainders among devisees for life.

Whether a gift to several persons as tenants in common for life, with a remainder over of the entirety after the death of the survivor, would raise cross remainders by implication for the purpose of filling up the vacancy between the death of the pre-deceasing devisees and of the survivor, has never been decided. The result, sometimes, has been attained by rejecting the words which create the tenancy in common: *Tuckerman* v. *Jeffries*, 3 Bac. Ab. 681; *Armstrong* v. *El-*

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dridge, 3 B. C. C. 215. [It is now settled, that a devise to the children of A. for life, and for want and in default of such issue then over, creates cross remainders by implication for life among such devisees: *Ashley* v. *Ashley*, 6 Sim. 358; *Pearce* v. *Edmeades*, 3 You. & Coll. 246.]

—between devisees in tail.

And here we must take some notice of the well-known doctrine respecting the implication of cross remainders between devisees in tail. By this doctrine, where lands are devised to several persons as tenants in common (*a*) in tail, and the testator has evinced an intention that the estate shall not go over to the ulterior devisee until failure of the issue of *all* the tenants in tail, cross remainders are implied between them; and to this end nothing more is requisite than the ordinary words used to connect an estate tail and the ulterior devise, as in the instance of a devise to A., B., and C., as tenants in common in tail, and, *in default of such issue*, or *in case they shall die without issue*, then over; and it has even been held, that the mere word *remainder* will raise cross remainders: *Doe* v. *Burville*, 2 East, 47, n. Modern authorities have delivered the doctrine from several unmeaning distinctions which formerly embarrassed its application, such as a difference between devises to two and to a larger number, and between devises to the tenants in tail simply, and a devise to them *severally* or *respectively*: *Wright* v. *Holford*, Cowp. 31; *Phipard* v. *Mansfield*, Id. 797; *Watson* v. *Foxon*, 2 East, 36; *Doe* v. *Webb*, 1 Taunt. 237; *Green* v. *Stephens*, 12 Ves. 419, 17 Ves. 64; *Mortimer* v. *West*, 2 Sim. 274; *Doe* v. *Jenkins*, 3 Moore & Pay. 59; *Livesey* v. *Harding*, 1 Russ. & Myl. 636.

Remarks on doctrine advanced in *Livesey* v. *Harding*.

In the last case, Sir J. Leach is reported to have said, "where there is a gift to two persons only, and the heirs of their bodies, cross remainders will be implied, *although there is no expressed intention that no part of the estate shall go over until the failure of issue of both*, unless the limitation to them be *successively*, *severally*, or *respectively*, and then the remainders over will be several and respective." These observations might seem to import that a devise to two persons as tenants in common in tail will raise cross remainders *without any subsequent words*—a proposition which would go to revive the distinctions in the old cases (usually considered as exploded) for a purpose entirely new. In those cases, the point in controversy was, whether words introducing the devise over would raise cross remainders between more than two devisees, or where the gift was to the devisees "respectively," &c.; and it was never conjectured that the

(*a*) As to tenancy in common between devisees in tail, vide post, Sect. xvii.

implication could arise without some such words. Possibly the reporters, notwithstanding their general accuracy, misunderstood what fell from the learned Judge, who could scarcely have intended to propound, extra-judicially, (for the case before the Court did not raise the suggested points), a doctrine at once so novel, and, it is conceived, so untenable. [On the subject of cross remainders by implication among devisees in tail, see 2 Jarm. Wills, 457 et seq., where the numerous cases will be found and the causes explained which have rendered "one of the simplest doctrines in testamentary construction in our books one of the most voluminous." The conclusions from the cases are stated at p. 479.]

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XI. Ambiguities in wills, and admissibility of parol evidence.

AMBIGUITIES, PAROL EVIDENCE.

Uncertainty with respect to any essential particular in a gift necessarily defeats it. Such uncertainty may arise either from the absence of declared intention, or from the obscurity produced by contradictory declarations. A simple instance of the former, resulting from indefiniteness as to the subject-matter of the gift, occurs in the case of *Bowman* v. *Milbancke*, 1 Lev. 130, Raym. 97; where the expression, "I give all to my mother," was held to be insufficient to pass lands. So, in the case of *Mohun* v. *Mohun*, 1 Swanst. 201, 1 Wils. 151, the Court arrived at the same conclusion, on nearly similar words, viz. "I leave and bequeath to all my grandchildren, and share and share alike." So, in the case of *Jones* v. *Hancock*, 4 Dow, 145, where a testator devised to his daughter A. for life, with remainder to her first and other sons in tail male, with remainder to his daughter B., adding that the devise to A. was upon condition that she married a man possessed of property at least equal to if not greater than the property that he left her; and if she married a man with less property than that, then the testator left her only so much property of his as should be equal to the property of the man she married, and all the remainder of the property should pass over to B. The House of Lords held the devise over to be void for uncertainty. Gibbs, C. J., who delivered the opinion of the Judges, rested his arguments principally on technical reasoning, tending to shew that it was essential to a tenancy in common, that it should appear on the face of the instrument creating it what the specific interest of each tenant was, as appeared by the various writs giving remedies to tenants in common, all of which defined the shares intended to be recovered.

Devises fail from uncertainty, when.

Uncertainty of the devisees' shares.

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Other species of uncertainty.

Sometimes, the uncertainty arises from indefiniteness and obscurity as to the event on which the devise is to take effect; *Attorney-General* v. *Sibthorp*, 2 Russ. & M. 107; or from the devised estate being directed to go in the same manner as the testator's other estates, of which there are several, variously disposed of, and it does not appear which is intended: *Leslie* v. *Duke of Devonshire*, 2 B. C. C. 187.

It would be useless to multiply examples of gifts void for uncertainty, which more frequently occur in the early than in the later cases; for latterly the Courts have preferred acting upon very faint glimpses and slight indications of the testator's intention to holding the gift to be absolutely void for uncertainty, freely supplying, transposing, rejecting, and sometimes even changing words, to prevent the total failure of the devise: *Dent* v. *Pepys*, 6 Madd. 350; *Langston* v. *Pole*, 2 Moore & Pay. 490 (*a*). An illustration of the leaning to such a construction occurs in an early case, where the devise was to one of A.'s daughters that should marry with a Norton within fifteen years; it was contended that the devise was void for uncertainty, as two might marry with a Norton. But the Court agreed that the devise was good; for, that though the words were not who should *first* marry with a Norton, yet it was all one, because the law supplied these words: *Bate* v. *Norton*, Raym. 82.

Judicial anxiety to effect a devise.

Description need not be correct in all parts.

It is not necessary that all the parts of a testator's description of the subject of a gift should be accurate. It is only requisite that enough of correspondence should exist in some one particular, to remove all doubt of identity. Thus, a reference to occupancy will cure an error in local description, and vice versâ; *Parker* v. *Ayres*, 3 Keb. 637; *Halstead* v. *Searle*, 1 Lord Raym. 778; and an agreement in locality, an error in the tenure, as where leasehold is described as freehold, or freehold as leasehold: *Day* v. *Trig*, 1 P. W. 286; *Denn* v. *Kemeys*, 9 East, 366. And the same principle of construction applies to the respective parts of a description. Thus, in regard to locality, if the parish is right and the county wrong, the error is immaterial, provided the identity of the parish is not thereby brought into question: *Brown* v. *Longley*, 2 Eq. Ca. Ab. 416, pl. 14; *Langenew* v. *Bean*, Finch, 395.

And the same rule, of course, obtains in regard to the objects of

(*a*) [To the subject of "supplying, transposing, and changing words," Mr. Jarman has devoted a whole chapter in his Treatise on Wills. See 1 Jarm. Wills, 427. See also the Chapter on "Gifts when void for uncertainty," 1 Jarm. Wills, 315, where the subject is more fully developed than was consistent with the learned Editor's plan in the present work. See also the chapter on "The Admissibility of Parol Evidence," Id. 349.]

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gift. Thus, if a testator devises to John, the son of his brother William, and William's only son is named Samuel, the claim of Samuel would be unquestionable, notwithstanding the misnomer: *Brown* v. *Langley*, 2 Eq. Ca. Ab. 416, pl. 14; *Rivers's case*, 1 Atk. 410; *Still* v. *Hoste*, 6 Madd. 192. So, where the testator gives to Thomas, the second son of his brother John, the second son, though not named Thomas, will take, the brother having no son of that name: *Stockdale* v. *Bushby*, Geo. Coop. 229.

Latter of two repugnant clauses preferred.

Where the uncertainty arises from repugnancy, the expounding Judge is not so absolutely destitute of resources for rendering the devise effective as where it arises from a defect of expression; for, if any principle can be discovered warranting the preference of either of the discordant parts, the uncertainty is removed. Such a principle is supplied by the general doctrine, which discards the prior and gives effect to the posterior of two wills, which doctrine, applied to several parts of the same will, obviously suggests the prevalence of the latter part; and, accordingly, it has been held, that if two parts of a will are absolutely irreconcileable, the latter shall prevail: *Ulrich* v. *Litchfield*, 2 Atk. 372; *Sims* v. *Doughty*, 5 Ves. 243; *Constantine* v. *Constantine*, 6 Ves. 100; *Doe* v. *Biggs*, 2 Taunt. 109. [See the chapter on the "Effect of repugnancy or contradiction in wills," 1 Jarm. Wills, 411.]

But to be reconciled if possible.

Resort, however, is never had to this unsatisfactory rule until the complete failure of every attempt to give the will such a construction as will render all its clauses consistent and operative, in attaining which object the local order and arrangement of the various parts will be disregarded. Thus, if a testator devises all his property to A., and afterwards gives a specific part to B., the will will be read as giving part to B. and the remainder to A: *Cuthbert* v. *Lempriere*, 3 Mau. & Selw. 158. And if a testator gives Whiteacre to A. in fee, and afterwards gives the same lands to B. for life, the will will be read as a devise to B. for life, with remainder to A. in fee: *Anon.* Cro. El. 9; *Ridout* v. *Dowding*, 1 Atk. 419. See also *Holdfast* v. *Pardoe*, 2 Sir W. Blackst. 976; *Woolcomb* v. *Woolcomb*, 3 P. W. 112; *Bettison* v. *Rickards*, 7 Taunt. 105. And even where, in different parts of the will, the same property is given to two persons in fee, it seems to be the better opinion that they will be held to take as joint tenants; see *Anon.* 3 Leon. 11, pl. 27; arg. *Fane* v. *Fane*, 1 Vern. 30; and not the whole to the posterior devisee, which is the alternative construction, and has had some powerful advocates: Co. Litt. 112. b. See also *Ulrich* v. *Litchfield*, 2 Atk. 374. [In the recent case of *Doe* d. *Snape* v. *Nevill*, 12 Jur. 181, Q. B., T. L. being

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seised in fee of a freehold messuage, or dwelling-house, outbuildings, garden, and croft, in the parish of Yoxall, and being also seised of a piece of copyhold land adjoining and lying open to the said freehold croft, and not fenced off therefrom, and being also seised of a detached freehold close heretofore parcel of the late forest of Needwood, and allotted, on the inclosure thereof, to the said T. L., in respect of the said freehold and copyhold property, and being also possessed of personal property, died in August, 1819, having duly made and published his will in writing, executed and attested to pass real estates. By his will, after requiring his debts, legacies, &c. to be paid, he continued: "Afterwards I devise &c. unto my wife, Mary Lester, for her life, my messuage or dwelling-house, and other buildings belonging to the same, wherein I now inhabit and dwell, and the freehold croft and garden on which the said messuage and other buildings stand, and belonging to the same, lying and being in Yoxall; and from and after her death, I devise &c. the aforesaid messuage or dwelling-house, and other buildings, together with the said freehold croft and garden belonging to the same, unto William Sharratt, Francis Sharratt, and Harriet Lester, their heirs and assigns for ever, and to be equally divided amongst them; also I devise &c. unto my said wife, Mary Lester, her heirs and assigns for ever, *all* my real and personal estates whatsoever and wheresoever unto me belonging, both freehold and copyhold, and now surrendered to the uses of my will, and to have the same at my decease; but if my personal estate should not be sufficient to discharge my debts, then I charge my copyhold estate with the payment of the same." The lessor of the plaintiff claimed the freehold messuage or dwelling-house, outbuildings, garden, and croft, as heir-at-law of Mary Lester. The defendant claimed under the three devisees in reversion named in the will. The question for the opinion of the Court was, whether the freehold messuage or dwelling-house, garden, and croft, passed by the will to the said William, Francis, and Harriet, after the death of Mary Lester; or whether the same passed by the subsequent words in the will to the said Mary Lester in fee. The counsel for the defendant cited an anonymous case (Dalison 63), where "a man seised of lands in four counties, devises his lands in three of them, part to his wife and the residue to other persons, and, by other words in the same will, he devises *all* his lands to his wife, to be disposed of after his death for the use and benefit of his son: And, by the whole Court, nothing passed by those words of the will except the lands in the fourth county, not before mentioned in the will." Wightman, J., said: "The question here is, whether the testator, in the second devise,

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intended to give the whole of his estates or only a part. There is property to satisfy the words of both devises. If the word 'all' in the second devise is to be taken strictly, the two devises cannot be reconciled; but if it may be construed to mean 'all the rest,' they are not inconsistent. The case in Dalison is precisely in point. *Ulrick* v. *Litchfield*, 2 Atk. 372, is not against this view. By using, in the last devise, the words, 'and now surrendered to the uses of my will,' and by charging contingently his copyhold estates only, and not his freehold, with the payment of debts, the testator seems there to be considering his copyhold estates only."—*Judgment for defendant.*] The liberty taken by the Courts in transposing the clauses of a will, in order to render the whole consistent, might be illustrated by a great variety of cases, and is, indeed, one of the most familiar doctrines of testamentary construction.

Repugnant words rejected.

The rule which prefers the posterior of two inconsistent clauses, must not be so applied as to give undue weight to words of mere repugnancy, engrafted on a preceding, clear, and definite devise, and which ought, according to the authorities, to be rejected. Thus, where a testator devises to A. and his heirs *for their lives*, the devisee has been held to take a fee in spite of the added inconsistent words: *Doe* v. *Stenlake*, 12 East, 515. So, where a testator bequeathed an annuity to be equally divided between A., B., and C., adding "to them and their heirs, or the survivor of them, *in the order they are now mentioned*," the latter words were disregarded as being of uncertain meaning, and inconsistent with the plain preceding expressions denoting equality of division: *Smith* v. *Pybus*, 9 Ves. 566. [See also 1 Jarm. Wills, 422.]

So, a devise unambiguously expressed, will not be cut down by the reason assigned, which does not support its whole extent: *Cole* v. *Wade*, 16 Ves. 27.

Upon the same principle, it has been held that a devise to a person and the heirs of his body is not controlled or modified by the addition of words pointing at equality of division, as "equally to be divided," "share and share alike," &c., which merely shew that the testator had an erroneous impression of the course of devolution under an estate tail, or had conceived the impracticable project of changing such course: *Jesson* v. *Wright*, 2 Bligh, 1; *Doe* v. *Featherstone*, 1 Barn. & Adol. 944.

Still it is not to be denied that words ambiguous in themselves will yield to subsequent expressions clearly intended to have an explanatory or modifying effect: *Crone* v. *Odell*, 1 Ball & Bea. 449, *S. C.* in Dom. Proc. 3 Dow, 61. See also *Roe* v. *Avis*, 4 T. R. 605. [See 1 Jarm. Wills, 412.]

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Patent ambiguities not removable by parol evidence.

Where the uncertainty is palpable on the face of the will, it is styled an ambiguity patent, and is irremoveable by parol evidence; because, to admit such evidence for the purpose of explaining what the will itself has left uncertain, would be to set up a nuncupative will, in disregard of the enactment in the Statute of Frauds, which has subjected such wills to special regulations, and would be no less repugnant to general principles of law governing the construction of written instruments. In regard to no doctrine, therefore, have the Courts evinced more steadiness and consistency of determination than in the rejection of parol evidence to clear up ambiguities apparent on the face of the will, whether offered to supply omissions, remove redundancies, or induce the transposition or change of words or clauses, or the giving to them a strained signification: *Lord Cheney's case*, 5 Rep. 68; *Strode* v. *Falkland*, 3 Ch. Rep. 98; *Bertie* v. *Falkland*, 1 Salk. 232; *Lord Walpole* v. *Earl of Cholmondeley*, 7 T. R. 138; *Doe* v. *Oxenden*, 3 Taunt. 147, 4 Dow, 65; *Doe* v. *Greening*, 3 M. & S. 171; *Doe* v. *Lyford*, 4 M. & S. 550; *Miller* v. *Travers*, 1 Moo. & Scott, 342, in relation as well to personal as to real estate; *Ulrich* v. *Litchfield*, 2 Atk. 372; *Mounsey* v. *Blamire*, 4 Russ. 384. Thus, if a testator devises to one of the sons of A., evidence cannot be received to shew which of the sons was intended; and hence the devise is necessarily void. See 2 Vern. 624, 625; T. Raym. 82. And where a testator gave a legacy of 300*l.* to the children of his late cousin E. B., evidence was rejected of the testator having declared that the bequest should apply exclusively to E. B.'s children by one husband, since it would, by the general rule of construction, extend to both classes of children: *Hampshire* v. *Peirce*, 2 Ves. sen. 216.

So, if a testator wholly omits the name of the devisee or legatee, it is impossible to supply the omission by parol evidence: *Wynne* v. *Littleton*, 2 Ch. Cas. 51; *Baylis* v. *Attorney-General*, 2 Atk. 240. [As to a devise inadvertently omitted, see *The Earl of Newburgh* v. *Countess of Newburgh*, 5 Madd. 364; and *Langston* v. *Langston*, 8 Bligh, N. S. 167; and Mr. Jarman's observations thereon, 1 Jarm. Wills, 353, n. (*f*), 355.]

Defective descriptions aided by parol evidence.

But in some instances of personal legacies, Courts of equity have gone very far in admitting such evidence in aid of defective descriptions, as where the Christian name was omitted, the bequest being to —— Price, son of —— Price (*a*); *Price* v. *Page*, 4 Ves. 680; or

(*a*) In *Colpoys* v. *Colpoys*, Jacob, 465, Sir T. Plumer, M. R., referred to this case as contradicting the position, that parol evidence is not admissible to explain a patent ambiguity. It is submitted, however, that the ambiguity is

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the initial letters only of both christian name and surname were given, the bequest being to W. G. and Mr. S. G.; *Abbott* v. *Massie*, 3 Ves. 148; but a bequest to Lady —— has been held to be too defective to be supplied: *Hunt* v. *Hort*, 3 B. C. C. 311. The models of a sculptor have been held to pass by the contraction "mod:" *Goblet* v. *Beechy*, Hil. Term. 1829, cor. Sir L. Shadwell, V. C. Vide Mr. Wigram's Obs. [The decree, on further direction, was reversed by Lord Chancellor Brougham, 2 Russ. & Myl. 624; *S. C.*, Wigram on Extrinsic Evidence, Append. No. I.]

Latent ambiguities may be removed by parol evidence.

Where, however, the ambiguity is not apparent on the face of the will, but wholly arises out of the circumstances disclosed by the extrinsic evidence, it may be removed by evidence of the same nature; which, in effect, is merely to say that the *whole* of the parol evidence, and not part only, is to be received. Thus, if a testator devises Blackacre to his grandson John, and, upon investigation, it turns out that the testator has two closes called Blackacre, or two grandsons named John, evidence may be adduced to shew which of the closes or which of the grandsons is intended: *Jones* v. *Newman*, 1 Sir W. Blackst. 60; *Careless* v. *Careless*, 1 Mer. 384. [See other cases cited, 1 Jarm. Wills, 370—374, and Wigram on Extrinsic Evidence, 3rd ed.] And, if it turned out that the testator had no grandson John, but two grandsons, respectively named Robert and William, it seems that either of these might support his claims by parol evidence; for, where some particulars in the testator's description apply to one, and some to the other, extrinsic evidence will be let in for the purpose of aiding the discovery of the actual intention. [See 1 Jarm. Wills, 378, 379.]

Uncertainty produced by plurality of objects of equal pretensions.

Where there are two objects of exactly equal pretensions, whether more or less nearly answering to the description, as where the gift is to the testator's cousin John, and there are two cousins John, or two cousins named William and Samuel, and no John, and the evidence fails to establish any superiority of claim in either, such equality is necessarily fatal to the pretensions of both: *Dowset* v. *Sweet*, Amb. 175; *Doe* v. *Joinville*, 3 East, 172.

Evidence not admitted where no doubt is raised as to the intention.

It should be observed, that, in these cases, evidence of circumstances throwing light on the testator's intention is always to be preferred to that of his oral declarations; and, where they leave no doubt of the intention, evidence of such declarations is not admissible. And therefore, in a recent case, where a testator gave a legacy to a public

latent; for, until the extrinsic evidence has ascertained whether more persons than one of that surname were known to the testator, it cannot be pronounced whether the gift is ambiguous or not.

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charity, the title of which applied to one institution, and the locality to another, the Court, in deciding on their conflicting claims, admitted evidence of one having received the support and patronage of the testator at and subsequently to the making of his will, but rejected the evidence of the drawer of the will, as to the testator's oral intimation of his actual intention: *Capel* v. *Robarts*, 3 Hagg. 156.

Evidence not admitted, where there is an object answering the description.

The principle on which the evidence was rejected in the last case seems to be, that, coupling the will and the circumstances together, there was no ambiguity warranting the admission of parol evidence; and hence it agrees with and illustrates the point next to be noticed, namely, that where there is a subject or object of the devise answering to the description in the will, it is not allowed to be shewn that another subject or object not so completely answering to it was intended, the effect of which would be to contradict the will: *Delmare* v. *Robello*, 1 Ves. jun. 412; *Holmes* v. *Custance*, 12 Ves. 279; *Doe* v. *Westlake*, 4 Barn. & Ald. 57. And, even where there is no competition, it seems difficult to admit parol evidence in support of the claims of one to whom no part of the description applies, though authority for its admission, even in such a case, is not wanting; for, in one instance, by the help of such evidence, a person named Gertrude Yardley was allowed to take a legacy bequeathed to Catherine Earnley: *Beaumont* v. *Fell*, 2 P. W. 141. [In his Treatise on Wills, I., 382, Mr. Jarman says: "We should pause in acting on *Beaumont* v. *Fell* as an authority beyond its peculiar circumstances, unsupported as it is by any subsequent decision, admitting evidence to ascertain both the christian and surname, without the aid of any additional description. The case seems to have been generally considered as decided on the circumstance of the nickname; but even with regard to this the variation was not inconsiderable.]

Evidence of extrinsic facts, for what purposes admissible.

It is to be observed, that though, as we have seen, evidence is not admissible of the testator having attached any peculiar or extraordinary meaning to words of description, yet, where they refer (as indeed almost every description necessarily does) to some extrinsic fact, evidence may be resorted to for the purpose of ascertaining whether any given subject or object is within the words; in short (to adopt the pithy language of Lord Thurlow, in *Jeacock* v. *Falkener*, 1 B. C. C. 295), "although evidence cannot be read to prove what the testator meant by the words used in his will, yet it may as to facts upon which the testator made his will:" *Doe* v. *Collins*, 2 T. R. 498; *Goodtitle* v. *Southern*, 1 Mau. & Selw. 299; *Sanford* v. *Raikes*, 1 Mer. 646; *Doe* v. *Earl of Jersey*, 1 Barn. & Ald. 550, 3 Barn. & Cress. 870; *Ongley* v. *Chambers*, 8 J. B.

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Moore, 665. Thus, where a person devises his estate at Ashton, though parol evidence is inadmissible to shew that he intended more or less to pass under this denomination than the words properly embrace, yet resort may, and indeed must, be had to such evidence, for the purpose of ascertaining whether any particular field composes part of the testator's Ashton estate. [See 2 Jarm. Wills, 367—369.]

So, if a testator bequeaths a legacy to a servant, if in his service at the time of his decease, evidence may be adduced to shew that the claimant was in his service at that time; and for this purpose the testator's conduct towards the claimant, and even his declarations respecting the legacy, might be material as elucidating the fact, that the testator considered the legatee to be in his service: *Herbert* v. *Reid*, 16 Ves. 481.

[In the case of *Ryall* v. *Hannam*, 11 Jur. 761, a testator devised a copyhold estate to his nephew W. B. for life, with remainder "to E. A., a natural daughter of E. A., of the parish of G., single woman, who formerly lived in his service." It appeared by extrinsic evidence, that there was no one at the date of the will who answered the description, but that a person of the name of E. A. did live in the testator's service, and soon after leaving it had a son J. A., of whom W. B., the testator's nephew, was the putative father; that E. A. never had any other illegitimate child; and that she afterwards married J. C., by whom she had, at the date of the will, one daughter, M. A. Lord Langdale, M. R., held that the will was not void for uncertainty, but that J. A. was the party who answered the description.]

[In the recent case of *Doe* d. *Gaines* v. *Roast*, 12 Jur. 99, A. having, during the lifetime of his wife M., intermarried with C., died, leaving both M. and C. surviving. By his will, made after such marriage with C., and whilst she was living with him, he devised certain premises to his "dear wife C." It was contended for M., that, as there was but one person who in law answered the description of his wife, she alone was entitled to take: but the Court of Common Pleas held, that this was a good devise to C. Maule, J., said: "In former times, in construing grants and devises, the name prevailed over the 'demonstration,' as it was called, and the maxim was 'veritas nominis tollit errorem demonstrationis;' as, in the instance put by Lord Bacon, in his 'Maxims of the Law:' 'If I grant land episcopo nunc Londinensi qui me erudivit in pueritiâ, the grant is good, though he never instructed me.' But, in modern times, this rule has been, in some instances, in some degree relaxed

Veritas nominis tollit errorem demonstrationis.

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in favour of what is now the paramount rule of construction, the intention of the testator, and if this can be ascertained by legitimate evidence, it must prevail. Here you have the name of Caroline, for which there is no other competitor besides the lessor of the plaintiff, and she is ascertained to have been living with the testator as his wife, and to have gone through the marriage ceremony with him; and it is admitted, also, that it was his intention that she should take under his will. This being conceded, and he having given her an apt designation, there can be no doubt but that she does take. I say apt designation, for though not his wife de jure, she was de facto; he was living in bigamy, and might have purposed to insist upon the validity of the latter marriage, thinking that the former, on some ground or other, was invalid; and he has used the word 'wife' in his will as people would generally understand it, when applied to a person who bore the relation to him that the lessor of the plaintiff did. I think, then, that it is very clear what the testator intended, and equally clear that he has expressed his intention in intelligible language."]

Again, where a testator bequeaths a specific legacy of stock, in terms which do not accurately designate any of the existing public stocks, the state of his property in the funds when he made the will is admissible, as throwing light on his probable intention: *Dobson* v. *Waterman*, 3 Ves. 308, n.; *Selwood* v. *Mildmay*, Id. 306; *Penticost* v. *Ley*, 2 Jac. & W. 207. [Of these cases Sir James Wigram observes (Extrinsic Evidence in Aid of the Interpretation of Wills, 106, 3rd ed.), "It is (at least) doubtful whether they can be explained upon strict principles of exposition. It may, however, be said of the cases of *Selwood* v. *Mildmay*, *Doe* d. *Le Chevalier* v. *Huthwaite*, and the other cases just referred to, that, inasmuch as the evidence by which the intention was ascertained, consisted merely of *facts* collateral to the question of intention, no qualification of the rule, *by which direct proof of intention* is excluded, is, in those cases, judicially recognised.] See also *Stafford* v. *Horton*, 1 B. C. C. 482. And such inquiries have been sometimes directed with more doubtful propriety in elucidation of general stock legacies: *Fonnereau* v. *Poyntz*, 1 B. C. C. 473; *Colpoys* v. *Colpoys*, Jacob, 451.

[The seven propositions which Sir James Wigram has established in his elaborate and valuable work on the admission of extrinsic evidence in aid of the interpretation of wills, have already been quoted at length in the first volume of this work (pp. 404 et seq.); but it will be convenient here to re-state these propositions.

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I. "A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.

II. "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

III. "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible (*a*) with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

IV. "Where the characters in which a will is written are difficult to be decyphered, or the language of the will is not understood by the Court, the evidence of persons skilled in decyphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court of the proper meaning of the words.

V. "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

(*a*) "The word 'insensible,' as here used, is a word of art, which the reader will find in common use in reported cases."

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"The same (it is conceived) is true of every other disputed point, respecting which it can be shewn that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

Evidence of intention excluded;

VI. "Where the words of a will, aided by evidence of the material facts of the case, are sufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will, (except in certain special cases, see Prop. VII.) will be void for uncertainty.

except in certain special cases.

VII. "Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning —Courts of law, in certain special cases, admit extrinsic evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose.

"These cases may be thus defined:—where the object of a testator's bounty, or the subject of disposition, (i. e. the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator."

[However, Sir James Wigram observes (pl. 168), after a minute examination of the cases and authorities: "The decisions, then, in the excepted cases, must, it is conceived, be considered to a great extent as arbitrary, and not to be explained upon any determinate principle. They appear to be decisions in which a general principle has been sacrificed to meet the hardship of particular cases." See the extent of the doctrine stated in the judgment in *Miller* v. *Travers*, 1 M. & Scott, 342; *S. C.*, 8 Bing. 244; in which the Lord Chancellor, on appeal from the decision of the Vice-Chancellor, called in the assistance of Chief Justice Tindal and the Lord Chief Baron (Lord Lyndhurst). The conclusion which Sir James Wigram draws from this case of *Miller* v. *Travers*, and the two subsequent cases of *Gord* v. *Needs*, 2 M. & W. 129, and *Hiscocks* v. *Hiscocks*, 5 M. & W. 363, is, "that the only cases in which *evidence to prove intention* is admissible, are those in which the description in the will is *unambiguous* in its application to each of several subjects."]

XII. Operation of a general devise upon trust estates, remainders, and reversions, leaseholds, copyholds, and as an execution of powers.

Construction of a general devise.

Trust estates will pass by a general devise (*a*), provided there be nothing in the purposes and objects of the devise to raise an inference of a contrary intention. Thus, if a testator devises all his hereditaments or real estate simply to one or more persons in fee, for his, her, or their own use and benefit, such devise will carry freeholds or copyholds, of which the inheritance is in the testator in the character of trustee or mortgagee. See *Littleton's case*, 2 Vent. 351; *Ex parte Sergison*, 4 Ves. 147; *Attorney-General* v. *Buller*, 5 Ves. 339; *Lord Braybroke* v. *Inskip*, (a leading case), 8 Ves. 417; [*Sharpe* v. *Sharpe*, 12 Jur. 598. See 1 Jarm. Wills, 638 et seq.]

Trust estates pass by a general devise, when.

But, if the devise be to uses to prevent dower, to uses in strict settlement or subject to executory limitations, or creates a general trust or charge for the payment of the testator's debts, legacies, or any other monies, the trust or mortgage estates will not pass; *Duke of Leeds* v. *Munday*, 3 Ves. 348; *Roe* v. *Reade* (a leading case), 8 T. R. 118; *Ex parte Morgan*, 10 Ves. 101; *Re Horsfall*, 1 M'Clel. & You. 292; [*Lindsell* v. *Thacker*, 12 Sim. 178; *Doe* v. *Lightfoot*, 8 Mee. & W. 553;] and of course the same negative doctrine would apply to a devise in trust for sale [*Ex parte Marshall*, 9 Sim. 555], though it has been held that such devise will pass lands contracted to be sold, which may be considered for some (though, as this case shews, not for all) purposes as trust estates: *Wall* v. *Bright*, 1 Jac. & W. 494. [See Mr. Jarman's remarks upon *Wall* v. *Bright*, 1 Jarm. Wills, 653; and as to devises of lands contracted to be sold by a testator, Ib. 651.] There is greater inconvenience in permitting estates of this description to get into the hands of an infant heir, than even trust estates strictly so called; because the stat. 11 Geo. 4 & 1 Will. 4, c. 60, ss. 16, 17 (ante, Vol. 6, p. 420), requires a purchaser to obtain a decree in equity for the specific performance of the contract, before an order can be granted for the infant heir of the vendor to convey.

As to estates contracted to be sold.

It seems that the circumstance of the devisees being made tenants in common will not alone exclude trust estates, though this is not a usual or convenient mode of devising such estates: *Ex parte Whiteacre*, Rolls, July, 1807, 1 Sand. Us. & Tru. 285.

Tenancy in common.

(*a*) It may prevent misapprehension, to explain once for all, that, throughout this section, a *general* devise means a devise not expressly including or excluding property of the particular description in regard to which the question is raised.

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Whether infancy or coverture a ground for excluding trust estates.

It has never been decided, whether the infancy or coverture of the devisee at the time of the making of the will would have an excluding effect. Some of Lord Eldon's reasoning in the case of *Lord Braybroke* v. *Inskip*, 8 Ves. 417, might seem to favour the affirmative conclusion; but there is much objection to allowing the construction to be influenced by extrinsic circumstances; and in the case of *King* v. *Denison*, 1 Ves. & Bea. 275, the same learned Judge declined to make the coverture and infancy of the devisees a ground for holding them to take beneficially. This case seems to furnish an analogous principle.

Suggestion as to devising legal estate to cestui que trust.

Express devises of estates held as trustee or mortgagee were until lately inserted as a matter of course in every regularly drawn will. [But the recent cases of *Cooke* v. *Crawford*, 13 Sim. 91, and *Mortimer* v. *Ireland*, 6 Hare, 196, have made this practice one of at least doubtful propriety, except as to mortgage estates.] Sometimes the will of a trustee affords a convenient mode of bringing home the legal estate. As, where a mortgagee in fee has been paid off without executing a reconveyance, he might by his will, instead of vesting the estate in a trustee for the mortgagor, devise it directly to the latter. Advantage may sometimes be taken of this suggestion, where it is desired to convey the estate to a cestui que trust without disclosing the trust. For instance, suppose a trustee for sale purchases the trust estate, (a transaction which is often morally fair, though indefensible at law), and a third person, probably a relation, is made the nominal purchaser, a devise in the will of the latter would have the effect of vesting in the most convenient manner the estate in the real purchaser.

Remainders and reversions pass by a general devise, when.

Remainders or reversions in fee will pass under a general devise of lands; and the latter cases have strongly inclined to the establishment of the rule that the inapplicability of *some* of the limitations of the devise to a remainder or reversion, forms no ground for its exclusion (*a*). Thus, if lands are settled to the use of A. for life, with remainder to his first and other sons in tail male, with remainder to A. in fee; and A., by his will, devises all his lands to his first and other sons in tail male, with remainder to his daughters in tail, the remainder in fee will pass by the will; for, though the devise to the sons could not operate on it, the devise to the daughters might: *Church* v. *Mundy*, 15 Ves. 396; *Doe* v. *Bartle*, 5 Barn. & Ald. 492; which have overruled *Roe* v. *Avis*, 4 T. R. 605. See *Strong* v. *Teat*,

(*a*) It is obvious, that more than one of the points discussed in this section might concurrently arise; for instance, a testator might have a remainder in the character of trustee, in which case the operation of his devise would depend upon the rule of construction applicable both to trust estates and remainders.

2 Burr. 912, 3 B. P. C. Toml. ed. 219; *Goodtitle* v. *Miles*, 6 East, 494, 2 Ves. & Bea. 187. And the effect would be the same if the devise was of the testator's lands "not settled," *Cooke* v. *Gerrard*, 1 Lev. 212, or lands not in settlement; because these words are construed to refer to the estates affected by the settlement, and not to the corpus of the lands, i. e. as if the testator had said, I give all my lands, except the estates therein which are vested in other persons by settlement: *Strode* v. *Lady Falkland*, 2 Vern. 621; *S. C.*, nom. *Falkland* v. *Litton*, 3 B. P. C. Toml. ed. 24. See also *Chester* v. *Chester*, 3 P. W. 56; *Glover* v. *Spendlove*, 4 B. C. C. 337; *Attorney-General* v. *Vigor*, 8 Ves. 256.

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[Sir James Mansfield, in *Morgan* v. *Surman*, 1 Taunt. 292, characterised *Chester* v. *Chester* as "a shocking decision." Mr. Jarman, 1 Treat. on Wills, 601, says, "the rule of construction established by these cases has been much condemned, as savouring of extreme technicality, and inimical to popular notions and probable intention." That, however, this rule is open to rather stronger animadversion than that of being merely "inimical to popular notions and *probable* intention" may, it is submitted, be shewn from the consideration of the case of the *Incorporated Society* v. *Richards*, 1 Dru. & War. 258, 1 Con. & Laws. 58, recently decided by Lord Chancellor Sugden. In that case, T. M., being seised of an estate tail in certain lands, by articles entered into before his marriage, covenanted, that, as soon as a fine should be levied and a recovery suffered, he would convey the said lands to trustees to the use of himself for life, remainder to secure a jointure for his wife, remainder to the first and every other son of the marriage in strict settlement, remainder to the issue male of the said T. M. by any future marriage, remainder to the daughters of the said T. M. equally in tail, and, in default of such issue, to the right heirs of the said T. M.; and in case the said T. M. should die without issue or making a will, then the lands were limited over in fee. The marriage took effect, and a fine was levied, and a recovery suffered pursuant to the articles. T. M. afterwards became seised in fee of certain lands in the county of Meath; and, in 1773, by his will directed that a competent part of his *unsettled* estate should be sold for payment of certain charges, and devised "all the residue and remainder of his said *unsettled* real estate" which should remain after payment of the said charges, to his wife for life, and, after her death, to the Incorporated Society in Dublin for Promoting English Protestant Schools in Ireland. T. M. died in 1774 without altering or revoking his will, and without issue. It was held, in assumed accordance with the rule established by the cases of

Violenced one to the manifest intention of the testator.

Incorporated Society v. *Richards*.

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Chester v. *Chester* and the others, that the reversion in the lands comprised in the marriage articles passed by the devise. If this decision, which is open to other objections, and will probably have to be reconsidered, can stand, it will afford a striking instance of the violence which may be done, by the rule in *Chester* v. *Chester*, to the evident intention of the testator. The conflict arises from the different meanings attached by lawyers, and those who are not lawyers, to the word *estate;* the former using the word to denote *an interest in the land*, the latter *the land itself.* This consideration renders it advisable always to use the words *lands* or *lands and tenements*, instead of *estate* or *real estate*, when the land itself, and not the interest in it, is intended to be spoken of. What rendered this case a still stronger instance of violence done to the manifest intention of the testator, was the fact that the lands comprised in the articles above mentioned, had been for a great many years a settled estate in the family, and were very distinct from the lands not comprised in such articles, which had subsequently descended to the testator upon the death of an uncle.]

Immediate charges inoperative to exclude reversions.

So, where a testator, having a reversion or remainder in fee, makes a general devise of his lands, giving thereout a life annuity to a person who is already tenant for life of such lands, this annuity will not prevent the reversion or remainder from passing by the devise: *Doe* v. *Weatherby*, 11 East, 322; *Doe* v. *Fossick*, 1 Barn. & Adol. 186.

Immaterial whether the testator has other lands.

It should be observed, that the circumstance of the testator having or not having other lands on which the limitations or charges, inapplicable to the remainder or reversion, may operate, does not exert any influence on the rule of construction in question. If he had other lands, then *all* the limitations will take effect as to such other lands, and the applicable limitations only in regard to the remainder or reversion, reddendo singula singulis; if he had no other lands, the argument for including the remainder or reversion acquires increased force, for (as observed by Lord Eldon in *Church* v. *Mundy*) [12 Ves. 426, on which case see Mr. Jarman's remarks, 1 Jarm. Wills, 609], "since there is no other subject to which the words can be applied, the testator must, if he does not mean that, be considered as having no meaning."

Leaseholds for

Leaseholds for years did not pass under a general devise of lands (*a*),

Immaterial whether devise is of messuages or lands, &c.

(*a*) It is immaterial, in regard to the application of the doctrine in question, whether the words of the devise are more or less comprehensive; for instance, the question, whether a leasehold messuage passes under a devise of all the testator's messuages, will be governed by precisely the same principle as the question, whether a leasehold close of land passes under a devise of all the testator's lands,

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if the testator had freeholds when he made his will, on the ground, it should seem, that the words were to be taken in the first instance in digniori sensu, and were not to be extended to any inferior or less appropriate subject, unless the devise, if not so extended, would be wholly inoperative: *Rose* v. *Bartlett*, Cro. Car. 292; *Davis* v. *Gibbs*, 3 P. W. 26; *Knotsford* v. *Gardiner*, 2 Atk. 450; *Thompson* v. *Lady Lawley*, 2 Bos. & Pull. 303, where the anterior cases are fully commented upon by Lord Eldon (*a*).

years pass under a general devise, when.

Rule as to unattested wills.

And the circumstances, that the will was incapable of operating on freeholds for want of an attestation, and that it contained no other clause under which the leasehold property could pass if not by this, did not warrant a variation in the construction: *Chapman* v. *Hart*, 1 Ves. sen. 271. See also *Sampson* v. *Sampson*, 2 Ves. & Bea. 337.

Copyholds pass by a general devise.

In the two cases just cited, the question related not to leaseholds but to copyholds not surrendered to the use of the will, which were subject to a similar rule before the stat. of 55 Geo. 3, c. 192, which, by dispensing with such surrenders, placed copyholds on an equal footing with freeholds: *Doe* v. *Ludlam*, 5 Moore & Pay. 48, 7 Bing. 275. Whether the ownership of copyholds had the same effect as of freeholds in excluding leaseholds, is a point which has not yet arisen. [As to the operation of a general devise on copyholds, see 1 Jarm. Wills, 611—616; *Dand* v. *Thompson*, 7 Q. B. 897.]

Undecided points suggested.

Other questions, equally untouched by decision and equally doubtful upon principle, are, whether the fact of the testator's having, when he made his will, freehold lands of inheritance, as trustee or mortgagee, or a power of appointment of which the devise would be an exercise, formed a ground for the exclusion of leaseholds to which he is entitled beneficially (*b*). The former question, of course, could only arise where the devise was such as would operate on trust estates,

and so with respect to local limits. Thus, a devise of lands at F. will pass leaseholds at F., if the testator has no freeholds there, but not if he has: *Ross* v. *Ross*, 1 Eq. Ca. Ab. 124, pl. 14; *Chapman* v. *Hart*, 1 Ves. sen. 271. But it has been decided, that where a testator devises all his *farms*, lands, &c., a farm composed of freehold and leasehold lands let at an integral rent, will pass: *Lane* v. *Stanhope*, 6 T. R. 345. See also *Doe* v. *Lucan*, 9 East, 448.

(*a*) It is a general rule, not limited to this class of cases, that where there are two subjects, one more precisely answering to the terms of a given description than the other, the devise will be confined to the former, though it might have embraced the latter if it had been the only subject, ut res magis valeat quam pereat: *Roe* v. *Bell*, 8 D. & R. 579; *Wills* v. *Sayers*, 4 Madd. 409; *Doe* v. *Roberts*, 5 Barn. & A. 407.

(*b*) Of course, it would form a ground for excluding leaseholds possessed by the testator as trustee or mortgagee; but, as an assignment of them might always be obtained from the executors or administrators, the question as to them does not arise.

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(vide ante, p. 279), and the latter where the will was executed in the manner the power required: the technical reasoning on which the doctrine evidently stands would seem to lead to the affirmative conclusion in regard to all the suggested points; but its extension to them would have to encounter the dislike to the rule produced by the conviction that the construction which excluded leaseholds from a general devise disappointed the intention; as a testator commonly uses the words messuages, lands, or hereditaments, in reference rather to the corpus of the property than to the nature or quantity of his interest in it; which consideration has sometimes induced a departure from the construction on very slight grounds, such as that of the devise being of the lands of which the testator is *possessed*—this being a word more appropriate to personal than to freehold interests; *Addis* v. *Clement*, 2 P. W. 456; a ground of determination which Lord Eldon considered to be very refined; (see 2 Bos. & Pull. 313); though the present Master of the Rolls seems to have lent some countenance to it in a recent case. See *Dixon* v. *Dawson*, 2 Sim. & Stu. 327. [Mr. Jarman has subsequently characterised these cases as having "proceeded upon distinctions which are certainly not at this day tenable:" 1 Jarm. Wills. 622.]

Effect of words of limitation being introduced applicable to personalty.

The use of words of limitation applicable to both real and personal estate seems to be rather a stronger ground for including leaseholds than the circumstance just adverted to; but no decision has gone the length of averring its adequacy: for, in the case of *Dixon* v. *Dawson*, 2 Sim. & Stu. 327, where such words occurred, the Vice-Chancellor relied more on the evidence of intention drawn from the entire will than upon the words of limitation. At all events, it is clear that leaseholds did not pass under a devise of real estate to trustees, their *executors or administrators*, in trust for certain persons *and their heirs*: *Whitaker* v. *Ambler*, 1 Eden, 151. Where a testator devised all his lands, tenements, and hereditaments to trustees, their heirs, executors, administrators, and assigns, according to their several and respective estates, and interests therein; and the testator, in another part of the will, declared that the rents were to be subject to ground rents and other outgoings, it was held that the devise embraced leaseholds as well as freeholds: *Hartley* v. *Hurle*, 5 Ves. 540. [In this case Sir R. P. Arden, M. R., said: "The first words, 'messuages, lands, tenements, and hereditaments,' alone, certainly would not pass a leasehold estate; but I am clearly of opinion that what follows is sufficient. He gives his messuages, lands, tenements, and hereditaments, and his monies in the funds, to the trustees, their heirs, executors, administrators, and assigns, according to the several and re-

spective estates and interests therein; and the word 'ground-rents' puts it out of all doubt."]

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Whether inadequacy of freeholds to bear a charge sufficient.

It seems to have been considered that the circumstance of the devise being subject to a charge which the freeholds alone were inadequate to bear, authorised its extension to copyholds: *Doe* v. *Lucan*, 9 East, 448. If this point can be maintained, the inadequacy must be proved to have existed at the time of making the devise.

[The 26th section of the stat. 7 Will. 4 & 1 Vict. c. 26, enacts, That any general devise which would describe a customary, copyhold, or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, or leasehold estates of the testator to which such description shall extend, as well as freeholds, unless a contrary intention appear.]

Powers exercised by a general devise, when.

The remaining question under the old law was, whether a general devise operated as an execution of powers over real estate. This depended on the same fact which determined the applicability of such a devise to leaseholds, namely, whether there was any other subject for its operation. Thus, if a testator devised all his real estate, and it turned out that he had no real estate at the time, but that he had a testamentary power over real estate, the devise operated as an appointment under the power, notwithstanding that the testator had, by the same will, expressly exercised other powers vested in him: *Attorney-General* v. *Vigor*, 8 Ves. 256. See also *Standen* v. *Standen*, 2 Id. 589 (*a*). On the other hand, if the testator had real estate upon which the will operated, (or rather upon which it might have operated, for, of course, the failure of the devise from circumstances subsequent to the execution did not vary the construction), it was presumed that the devise was made with a view to that property, and not as an exercise of the power; *Sir Edward Clere's case*, 6 Co. 17 b; *Ex parte Caswall*, 1 Atk. 559; even though the terms of description were rather more comprehensive than was required to embrace the testator's own property; as where a testator devised all his "messuages, *lands, tenements, and hereditaments*," though it turned out that the property of the testator con-

(*a*) Still, however, it did not follow that every devise which would, from the generality of its terms, comprise real estate belonging to the testator, if there had been any such, would operate as an execution of a power. Thus, where a testator, by a will attested by three witnesses, devised all his estate and effects of whatever denomination, Sir T. Plumer, M. R., held, that though these words would have passed any real estate of which the testator might have happened to be seised, they did not demonstrate an intention to exercise a power over real estate: *Jones* v. *Curry*, 1 Swanst. 66.

General devise which would operate on real estate not necessarily sufficient to exercise power.

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sisted of houses only, yet it was held that the power was not exercised: *Hoste* v. *Blackman*, 6 Madd. 190. Where a testator who had freeholds but not copyholds, and a power over both, devised his freehold and copyhold estates, it was held that the devise operated as an execution of the power in respect of the copyholds but not of the freeholds: *Lewis* v. *Llewellyn*, Turn. & Russ. 104. It has been decided that a general devise of all the *lands* which the testator had power to dispose of did not extend to monies to arise from the sale of lands, over which *monies* the testator had a disposing power: *Adams* v. *Austen*, 3 Russ. 461.

Devise of lands in A., when it operated as an appointment.

The principles applicable to general devises extended to devises of land circumscribed by locality. Thus, if a testator devised all his lands in the parishes of A. and B., having lands in A. only, and a power over other lands in A., and also over lands in B., the devise executed the power over the lands in B., but not the power over those in A.: *Napier* v. *Napier*, 1 Sim. 28. And, in a case which underwent much discussion, and was eventually decided by the House of Lords, where A., being seised in fee of an undivided moiety of lands in Surrey, the other moiety in which had been limited to her for life, remainder to such uses as she by deed or will should appoint, devised all her freehold estates in the county of Surrey, this devise was held to be satisfied by embracing the first moiety, and did not operate as an appointment of the second: *Roake* v. *Denn*, 4 Bligh, P. C. New Ser. 1. See also *Doe* v. *Roake*, 2 Bing. 497; *Denn* v. *Roake*, 5 Barn. & Cress. 720.

General bequest does not exercise power over personalty.

The ground for reading a general devise as an appointment, it will be observed, was confined to real estate, (every devise of which, expressed in terms either general or particular, was specific), and did not apply to personalty; for, as a will of personal estate always comprised whatever a testator *died* possessed of, it was not necessarily to be presumed that he had any specific property in his view when he made it; and therefore, even if it appeared that the testator had no other disposable property at the time of the making of his will or at his death, (*Molton* v. *Hutchinson*, 1 Atk. 558; *Buckland* v. *Barton*, 2 Hen. Black. 136; *Langham* v. *Nenny*, 3 Ves. 467; *Croft* v. *Slee*, 4 Ves. 60; *Bradly* v. *Westcott*, 13 Ves. 445), or that the exclusion of the subject of the power would leave the residuary clause nothing to operate upon, or render the personal estate inadequate to the payment of pecuniary legacies, still the will did not operate as an exercise of the power: *Andrews* v. *Emmot*, 2 B. C. C. 297; *Bennett* v. *Aburrow*, 8 Ves. 609. And the circumstance, that the donee, being a married woman, had no general testamentary capacity, (but who, let it be re-

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membered, might have separate estate disposable by will), has been held to form no ground for varying the construction: *Lovell* v. *Knight*, 3 Sim. 275.

What denotes intention to exercise power over personalty.

And though an intention to exercise the power might be collected by implication from the whole instrument; *Hunloke* v. *Gell*, 1 Russ. & Myl. 515; yet the bequest of a sum of money, corresponding in amount with that over which the power extends, raised no such inference, though the testator, when he made his will, was not possessed of any other property affording a fund for payment, as he might have calculated on future accessions: *Jones* v. *Tucker*, 2 Mer. 533. For the same reason, a general bequest of personal estate, described as consisting of "money in the funds," &c. did not operate as an appointment of stock, though the testator had no stock of his own at the time: *Webb* v. *Honnor*, 1 Jac. & Walk. 352. On the other hand, the excepting of a definite portion of stock out of a particular fund (as "50*l.* out of my Bank Stock,") has been considered to mark an intention to include the residue of such stock in the general bequest: *Walker* v. *Mackie*, 4 Russ. 76.

Rule as to leaseholds.

The consideration that the testator, in designating a particular species of property, may have contemplated its future acquisition, applied no less to leaseholds than to any other subject of personal property; and yet, in a modern case, an able Judge declared his inability to discover "any solid ground upon which it is to be maintained that a gift of leaseholds, where the donee of the power has no other leasehold than the subject of the power, is not equally to manifest an intention to execute the power, as a gift of freehold under the same circumstances. A general gift of monies and other personal chattels, which are in their nature subject to constant change and fluctuation, stands upon very different principles; and, as to them, the will must refer to them as the subjects of the power, or they will not pass:" per Sir J. Leach, M. R., *Grant* v. *Lynam*, 4 Russ. 296.

Remarks on doctrine advanced in *Grant* v. *Lynam*.

The reasoning of the learned Judge loses sight of the consideration, that, as a general bequest of leaseholds would include after-acquired leaseholds, its insertion in a will raised no such inference that the testator had any specific property in his view at the time, as a devise of real estates, which could only comprise what the testator then had. Untenable, however, as the reasoning in this case is, yet the doctrine which it advances seems to have been assumed in the subsequent case of *Lovell* v. *Knight*, 3 Sim. 275, where the question discussed was, whether a gift of "real property" was not tantamount in point of construction to a gift of leaseholds, being chattels "real," so as to render the devise an exercise of the power. The negative was

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decided, and therefore the ground for applying the doctrine in question failed.

Peculiarities of execution do not vary the construction.

It ought to be observed, that any peculiarity of execution, not requisite in the case of an ordinary will, would not shew an intention to execute the power, unless accompanied by some internal evidence of such intention. See *Jones* v. *Curry*, 1 Swanst. 66. This rule agrees with the doctrine well established, that a will expressed in terms applicable to personalty was not to be strained into a devise of freehold estate, because attested by three witnesses. (See cases cit. 2 Jarm. Pow. Dev. 158). Nor, on the other hand, would a general devise, which, by the ordinary rules of construction, would embrace real estate, be diverted to less appropriate subjects on account of the will not being attested so as to pass freehold estates; *Chapman* v. *Hart*, 1 Ves. sen. 270; *Sampson* v. *Sampson*, 2 Ves. & Bea. 337; which class of cases seems to establish the general principle, that the construction of an instrument is not to be in any manner influenced or affected by the circumstances of its execution.

Suggestion as to referring to powers in residuary bequests.

Having regard to the inefficacy of a general bequest of personalty to exercise powers over property of this description, many practitioners introduced into their common forms of such bequests words extending them to any personal estate over which the testator has a disposing power; which, it is clear, would exercise all the general powers over personalty that might happen to be vested in him, provided the instrument were sufficient in point of execution. [This practice of explicitly declaring the intention may usefully be continued, notwithstanding that the necessity for it has been to a great extent removed by the recent statute, and its adoption may extend to devises of real estate, and in fact to all the particulars which have formed subjects for consideration in the present section, namely, trust estates, remainders, reversions, leaseholds, and the execution of powers, which should be expressly included in devises that are intended to embrace them.]

What amounts to an appointment in wills made or republished since 1837.

[As to wills made or republished since the year 1837, it is provided by the 27th section of the statute 7 Will. 4 & 1 Vict. c. 26, "That a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a

bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."]

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[It is also to be borne in mind that all peculiarities in the execution of testamentary appointments are abolished by section 10 of the same statute, which enacts, "That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."]

Execution of testamentary appointments under the new law.

XIII. Vesting.

1. *As to the Vesting of Interests in real Estate.*

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The law is said to favour the vesting of estates; the effect of which principle seems to be, that property, which is the subject of any disposition by deed or will, will belong to the object of gift immediately on the instrument of conveyance taking effect, or so soon afterwards as the terms thereof will admit of. As a will takes effect at the death of the testator, it follows that an estate devised to a person then in esse simply, (i. e. without any expression of an intention to suspend or postpone its operation), vests in the devisee immediately on the death of the testator. Where words of futurity are introduced into the gift, it becomes necessary to determine whether they are inserted for the purpose of protracting the vesting, or point to the deferred possession or enjoyment only; and herein commonly consists the debateable ground.

General doctrine respecting vesting.

Where the testator creates a particular estate, and afterwards disposes of the ulterior property in the event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring to the possession or enjoyment only, which the antecedent gift has pre-occupied, and not as designed to postpone the vesting. Thus, where a testator devises lands to A. for life, and after his decease to B. in fee, the respective

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estates of A. and B., between whom the entire fee simple is parcelled out, are alike vested at the death of the testator, the only difference being, that the estate of the one is in possession and that of the other is in remainder.

Remainder in default of object of prior estate not contingent.

It may be stated as a general rule, that where a remainder is created *in default* or *for want* of the object of the preceding estate, these words do not render the remainder contingent, and thereby subject it to be defeated in the event of the prior devisee coming into existence; but such remainder is a vested interest absolutely expectant on the determination of the prior estate. [See 1 Jarm. Wills, 728, n. (*e*)]. Thus it has been held, that where lands are devised to the first and other sons successively of A. in tail, *and in default of such sons* to the daughters in tail, the devise to the daughters takes effect although A. has sons, they dying without issue: *Doe* v. *Dacre*, 1 Bos. & Pull. 250; *S. C.* B. R. 8 T. R. 112.

Again, where a testator devised to E. for life, and after her decease to the first and every other son of her body lawfully begotten, the elder to be preferred to the younger, and, for want of such sons, to the daughter or daughters of E., share and share alike, *and in default of such issue of E.*, then to M.; it was held that the devise to M. was a vested remainder expectant on the determination of the prior life estates to E. and her sons and daughters, and those estates having failed *by the death of E.'s only daughter*, it fell into possession: *Goodright* v. *Jones*, 4 Mau. & Selw. 88.

So, where a testator devised certain lands to D. for life, remainder to a trustee to preserve contingent remainders; remainder to the first and other sons of D., and their heirs, *and for want of such issue* to J. for life; with remainders over: it was held that the effect of the devises to the sons of D. was to give them successive estates tail, with a vested remainder over: *Lewis* v. *Waters*, 6 East, 336.

Where prior estate takes effect, but is determined in a different manner.

[Where the ulterior estate is expressed to arise on a contingent determination of the preceding interest, and the prior gift takes effect, but is afterwards determined in a mode different from that which is so expressed by the testator, the ulterior gift fails. See 1 Jarm. Wills, 730.]

Devise during widowhood, with devise over on marriage.

[However, where a testator makes a devise to his widow for life, if she shall so long continue a widow, and if she shall marry, then over, the devise over takes effect, at all events, on the determination of her estate, whether by marriage or death. See 1 Jarm. Wills, 731—733.]

Devises of reversions and remainders.

And here it may be noticed, that where a person, who is entitled to a reversion or remainder in fee expectant on an estate tail in him-

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self, by his will devises the lands after his decease, or in the event of his dying without issue, this is construed as an immediate gift of the testator's reversion or remainder; though upon the face of the will the devise presents the aspect of an executory gift to arise on a general failure of issue, which would clearly be void: *Badger* v. *Lloyd*, 1 Lord Raym. 523, 1 Salk. 232.

If the contingency described precisely corresponds with the event which determines the existing estate tail, no difficulty can arise in applying this rule of construction; but it frequently happens, that the terms used by the testator are not quite in unison with the event in question, as where the testator refers to issue generally, and the subsisting estates are restricted to issue of a particular marriage or sex. In such cases there might seem to be a strong ground to contend, that the want of correspondence amounts merely to an inaccuracy in the description of the reversion or remainder, and does not indicate that a different interest was in the testator's contemplation; and some well-known cases have been decided on this principle; *Wellington* v. *Wellington*, 1 Sir W. Bl. 645, 4 Burr. 2165; *French* v. *Caddell*, 3 B. P. C. Toml. ed. 257; *Jones* v. *Morgan*, Fea. C. R. 329; *Lytton* v. *Lytton*, 4 B. C. C. 441; *Egerton* v. *Jones*, 3 Sim. 409; yet a modern decision in the House of Lords favours a more rigid construction: *Banks* v. *Holme*, 1 Russ. 394, n. Lord Eldon's strictures upon this case in *Morse* v. *Lord Ormonde*, 1 Russ. 405, lead to the suspicion, that the decision of the House did not coincide with his own opinion, though it must have taken place while his Lordship held the Great Seal. It certainly exacts from testators more of technical correctness than it has been usual to require.

Devises seemingly contingent construed to be vested.

We now return to the consideration of devises creative of an interest expectant on the determination of a prior estate, for the sake of which, and not with the design of postponing the vesting, the gift is made to assume the form of a future disposition. This construction obtains, in some instances, where the terms in which the posterior gift is framed import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A. shall attain the age of twenty-one years, and if or when he shall attain that age to A. in fee, this is construed as conferring on A. a vested estate in fee-simple, subject to the prior chattel interest given to the trustees; and, consequently, on A.'s death under the prescribed age, the property descends to his heir-at-law; (cases from *Boraston's case*, 3 Rep. 19, down to *Warter* v. *Hutchinson*, 5 J. B. Moore, 143; *S. C.*,

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in B. R. 1 Barn. & Cress. 711 (*a*)); and it is not essential that the estate of the trustees should have been (though commonly it has happened to be) created for the benefit of the ulterior devisee: *Manfield* v. *Dugard*, 1 Eq. Ca. Ab. 195, pl. 4.

Words of contingency explained by the context.

Another instance of words of contingency introduced into a devise in remainder being referred to the possession or enjoyment only, occurs where such words, being literally construed, would seem to require that the prior estates should have determined in a given order; as, where lands were devised to A. in tail, with remainder to B. for life, and the testator subsequently declared, that, if A. died without issue, "*and B. be then deceased,*" he devised to C. and his heirs, it was held that these words were merely put in to express the testator's meaning that B. should be sure to have it for life, and not to defeat the devise over in the event (which happened) of B. surviving A.: *Anon.* 2 Vent. 363. See also *King* v. *Rumball*, Cro. Jac. 448; *Chadock* v. *Cowley*, Id. 695; *Fortescue* v. *Abbott*, Pollex. 479; *Pearsall* v. *Simpson*, 15 Ves. 29; *Massey* v. *Hudson*, 2 Mer. 138; which compare with *Holmes* v. *Cradock*, 3 Ves. 314; [*Parkin* v. *Hodgkinson*, 15 Sim. 293.]

Devise if A. shall attain twenty-one, contingent; otherwise, if a limitation over in alternative event.

[According to an opinion found among the posthumous papers of Mr. Fearne, and which seems to be approved of by Mr. Jarman (1 Treat. on Wills, 738), a devise to a person, if he shall live to attain a particular age, standing alone, would be contingent. (But see the case of *Snow* v. *Poulden*, 1 Keen, 186). However, if this devise be followed by a gift over in the event of the devisee dying under such age, the gift over is considered as shewing the meaning of the testator to have been that the attaining the prescribed age is not a condition precedent, but that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which gives him the immediate interest, subject only to the chance of its being divested on a future contingency: *Edwards* v. *Hammond*,

(*a*) [See the cases collected in 1 Jarm. Wills, 734, n. (*o*); also in the case of *Doe* d. *Cadogan* v. *Ewart*, 7 Ad. & Ell. 663; in which case a testator devised his real estate to trustees, upon trust for his wife during her life and widowhood, and after her decease or marriage again, upon trust to apply the rents towards the maintenance of his daughter, until she should attain the age of twenty-five, and from and after her attaining that age, then upon trust for his said daughter, her heirs and assigns, for ever; but in case his said daughter should depart this life without leaving issue, then he devised his said real estate over. The testator's wife died in his lifetime. The daughter survived the testator, but died under twenty-five, leaving no issue, but having suffered a common recovery; and it was held, that such recovery was effectual to acquire the equitable fee simple, she having a *vested* estate tail in equity at the time.]

3 Lev. 132; *Bromfield* v. *Crowder*, 1 Bos. & P., N. R., 313; *Doe* d. *Hunt* v. *Moore*, 14 East, 601.] VESTING OF REALTY.

[This doctrine is applicable to executory trusts. Thus, in the case of *Phipps* v. *Ackers*, 9 Cl. & Finn. 583, a testator devised his estates to trustees; and with respect to his lands at W., which he held in fee-simple, he directed that his trustees should stand seised thereof, in trust to convey the same to G. H. A., "when and so soon as he should attain his age of twenty-one years;" but in case he should die before he attained that age, without leaving issue of his body, then that the said lands at W., given and devised to him, should form part of the residue of the testator's real and personal estate, which he devised to another person. At the testator's death, G. H. A. was only twelve years of age. It was held, that an equitable estate in fee in the lands at W. vested in G. H. A. immediately on the testator's death, liable to be divested in the event of his dying under twenty-one without leaving issue of his body. In this case Lord Chief Justice Tindal, in delivering the opinion of the Judges, said: "In order to answer your Lordships' question, it is not necessary for us to say what would be the legal effect of a simple devise to A. and his heirs when or if he shall attain twenty-one, without any concomitant provisions calculated to shew whether the testator did or did not mean to treat the attaining twenty-one as a condition precedent. In such a case Mr. Fearne may be right in the opinion found among his posthumous works, that, until the devisee attains the prescribed age, he takes no interest whatever in the devised lands. But whatever might be the true meaning of such a devise, if it should occur by itself, there is ample authority for saying, that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event on the happening of which an estate already vested is to be divested in favour of some other person. And the cases on this subject appear to be resolvable into two classes: first, those in which the Courts have relied on the circumstance that the estate, prior to the attainment of the age of twenty-one, has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle* v. *Whitby*, (1 Burr. 228), or for the benefit of some other persons to endure during the minority, as in *Boraston's case*, (3 Rep. 16), and *Mansfield* v. *Dugard*, (1 Eq. Ca. Ab. 195); and, secondly, those cases in which the estates are given over in the event of the devisee dying under twenty-one, as in *Edwards* v. *Hammond*, (3 Levinz, 132); *Broomfield* v. *Crowder*, (1 N. R. 313); and *Doe* d. *Hunt* v. *Moore*, (14 East, 601). *Phipps* v. *Ackers*.

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The first class of cases proceeds on the ground that the estate given to the devisee on his attaining twenty-one, is in fact only a remainder, taking effect in its natural order, on the determination of the preceding estates; and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates. The second class of cases goes on the principle that the subsequent gift over in the event of the devisee dying under twenty-one, sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to; which of course gives him the immediate interest, subject only to the chance of its being divested on a future contingency."]

Whether original vesting is postponed or the estate is liable to be divested.

Sometimes a gift is expressed in terms which render it difficult to collect whether it is to vest immediately, with a liability to be divested at or on some future period or event, or whether it is originally made contingent until such period or event. To this description belong the numerous cases in which a gift over has been held to explain and neutralise the words of contingency introduced into the preceding original gift. As, where lands are devised to a person, *if or when he attains a certain age*, with a devise over in the event of his dying under that age; the devise over is held to be explanatory of the sense in which the preceding expressions importing contingency were used, namely, as pointing out when the estate of the devisee is to become absolute; and those expressions, therefore, do not postpone the vesting: *Edwards* v. *Hammond*, 3 Lev. 132, 1 Bos. & Pull. New. Rep. 324, n.; *Doe* v. *Moore*, 14 East, 61; *Doe* v. *Nowell*, 1 Mau. & Selw. 327, 5 Dow, 202. And the principle is not varied by the circumstance of another event being combined in the divesting clause with those which are introduced into the original gift, as in the case of a devise to A. if he shall attain the age of twenty-one years, and in case he shall die before he attains such age, and his brother shall survive him, then over: *Bromfield* v. *Crowder*, 1 Bos. & Pull. New Rep. 313.

Words of contingency in general to have full effect.

Subject, however, to these few excepted instances, in which the apparently contingent terms of the gift are explained by the context to be otherwise intended, the general rule is, that expressions which make a gift contingent, like every other part of a will, are to be allowed their full effect, and the devisee or legatee can take nothing unless the prescribed event happens, however plausible may be the conjecture that the testator did not rightly apprehend the import or

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operation of the words he has used: *Denn* v. *Bagshaw*, 6 T. R. 512; *Holmes* v. *Cradock*, 3 Ves. 317; *Shuldam* v. *Smith*, 6 Dow, 22. [The foregoing cases suggest the precaution, that persons taking instructions for wills, in which the vesting is to depend on the devisee or legatee attaining a particular age, or living to a given period, should carefully ascertain that the possibility of his dying in the mean time, *leaving issue*, is in the testator's contemplation: 1 Jarm. Wills, 745, n. (*g*).]

So, where a testator, reciting that he has a power of disposition in a certain event, exercises such power accordingly; if it should turn out that the event described does not happen, the gift will not take effect, though it should appear that the testator's power was larger than he imagined, and would have enabled him to dispose of the property in the event which did happen: *Doe* v. *Wilkinson*, 2 T. R. 209. But where a literal adherence to the contingent terms of a gift will defeat a purpose not merely conjectured but actually expressed by the testator, the gift will be moulded into a consistency with such expressed purpose: *Bradford* v. *Foley*, Doug. 63. [So, where a literal adherence to the recited terms of a gift (i. e. to their technical meaning) would defeat the actually expressed purpose of the testator, the words will not be construed according to the technical meaning. See Sir C. Pepys', M. R., judgment in *Berkeley* v. *Swinburne*, 12 Jur. 571. Sir C. Pepys said, in reference to this point, "According to the argument used, no child could have a vested interest until such child had attained the age of twenty-one years; it is quite impossible, therefore, to construe the words of the will according to the technical meaning: we must take it in the sense the testator meant to use it; and that it is not a vested interest in the usual acceptance of the term: we must take it as a defeasible interest, and not an indefeasible interest."]

Whether contingency affects one or more estates.

In framing a series of limitations in a will, one of which is clearly made contingent, it should be explicitly shewn whether the contingency extends to all the after-limited estates, or is confined to the estate with which it is immediately associated; more especially, if the intention does not coincide with the rule, that rule being, that, if no purpose is expressed distinguishing the estate in question from those which follow, the whole series will be considered as hinging on the contingency: *Davis* v. *Norton*, 2 P. W. 390; *Doe* v. *Shipphard*, Doug. 75; *Moody* v. *Walters*, 16 Ves. 283; [*Lenox* v. *Lenox*, 10 Sim. 487.] In order to confine the contingency to the proximate estate, either the testator must have expressed a purpose concerning

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that estate which does not apply to the others; *Napper* v. *Sanders*, Hutt. 119; *Bradford* v. *Foley*, Doug. 63; *Horton* v. *Whittaker*, 1 T. R. 346; or the subsequent estates must be detached from the contingent limitation, in a manner evidently denoting a different intention with respect to those estates: *Lethieullier* v. *Tracey*, 3 Atk. 774, Amb. 204; and see *Aislaby* v. *Rice*, 3 Madd. 265, 3 Moore, 358. (Compare these cases with *Doe* v. *Wilkinson*, 2 T. R. 209.)

Estate not divested unless all the prescribed events happen.

Where a gift originally vested is to be divested in favour of another devisee on the happening of several events, or rather of an event composed of several circumstances, the original gift will remain undivested, unless all the prescribed circumstances concur. Thus, if lands are devised to A. and his heirs, and if he shall die under the age of twenty-one years *and* without issue, then to B. in fee; if A. attains twenty-one, though he dies without issue, the lands devolve to his heir or devisee, his estate being undivested: *Walsh* v. *Peterson*, 3 Atk. 193. And this rule of construction applies in relation as well to circumstances which are personal to the substituted objects as to collateral events. Thus, where a fund was bequeathed to A. for life, and after her decease to B. and C. in equal moieties, and in case of the death of either of them in the lifetime of A., then the whole to the survivor *living at A.'s decease*. B. and C. both died in A.'s lifetime, and it was held that the original gift was not defeated: *Harrison* v. *Foreman*, 5 Ves. 207. Upon the same principle, it has been held that where a gift is made to A. for life, and after his death to his three children, *or such of them as shall be living* at A.'s decease, this is an immediately vested interest in the three children, subject only to be divested in favour of such of them as may happen to be living at the prescribed period (*Howes* v. *Herring*, M'Clel. & You. 295); and if none of the legatees shall be then in existence, (i. e. if all the three children of A. happen to die in his lifetime), the original gift to the whole remains undivested: *Sturgess* v. *Pearson*, 4 Madd. 411. See also *Bromhead* v. *Hunt*, 2 Jac. & Walk. 459. And the construction has been sometimes adopted where the will was less explicit on the point: *Browne* v. *Lord Kenyon*, 3 Madd. 410. [See 1 Jarm. Wills, 750—752.]

Whether substituted partial gift defeats prior gift in toto.

It seems to be a corollary from the doctrine of these cases, that, where the substituted executory gift is not co-extensive in point of interest with the prior gift, it defeats the latter pro tanto only. Such was evidently the opinion of Lord Alvanley, in the case of *Taylor* v. *Langford*, 3 Ves. 119, where A. by his will bequeathed the produce of his residuary estate to his two sisters, C. and D., share and share

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alike, during their natural lives, and after their decease the principal to be paid to their children; but whichever sister died before the other, then the share which was so paid to her should be paid to her children; but if such sister so dying *should leave no children, then the interest and produce to be paid to the survivor for her life as aforesaid.* A. having died without leaving children, it was contended that the first words completely disposed of the property, and the subsequent expressions were only applicable to the life interest of the sisters; and the decree, in this instance, and former orders in the cause, proceeded on this principle.

Where a charge is imposed of two sets of legacies, respectively to arise in alternative events, the property will be liable to one or to the other set of legacies according to the event, but not to both: *Swayne* v. *Smith*, 1 Sim. & Stu. 56.

2. *As to the Vesting of Pecuniary Charges on Land.*

VESTING OF PECUNIARY CHARGES ON LAND.

The same general principles which govern the vesting of real estates apply to pecuniary charges upon land payable in futuro, with respect to which one leading rule is, that, where the payment is postponed with a view merely to the circumstances of the estate, the vesting is immediate. As where lands are devised to A. for life, with remainder to B. in fee, charged with the payment to C. of 100*l.* within three months after the decease of A., the legacy to C., notwithstanding the postponement of payment, vests immediately at the testator's decease. Indeed, the reasoning which proves the estate of B. to be vested, would apply with exactly equal force to C.'s legacy, which was evidently postponed for the purpose of creating an exemption from the charge in favour of the prior life estate, and not in order to render the ulterior gift contingent: *Lowther* v. *Condon*, 2 Atk. 127; *Dawson* v. *Killett*, 1 B. C. C. 119; *Poole* v. *Terry*, 4 Simons, 294. [See the cases on this point collected, 1 Jarm. Wills, 757, n. (*d*).] And the same construction prevails where lands are devised to A. for life, with remainder to trustees upon trust to sell, and out of the produce to pay certain sums of money; for, though the fund out of which the payment is to be made has no existence until the death of A., a circumstance on which undue stress has been sometimes laid, yet, as the sale is obviously deferred for the sake of letting in the prior life estate, both the remainder of the trustees and the beneficial interests in the produce of the sale vest instantly on the testator's decease: *Bayley* v. *Bishop*, 9 Ves. 6.

Where payment is postponed for the convenience of the estate.

If, however, the postponement be connected with and dependent on

Where pay-

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ment is postponed from the circumstances of the legatee.

an event or circumstance personal to the object of the pecuniary gift, as where a testator charges his lands with the payment of 100*l.* to B., if or when he attains the age of twenty-one years, or gives to B. 100*l.* to be paid to him out of Blackacre upon his attaining the age of twenty-one years, (for such variations of expression, however important, as hereafter shewn in regard to personal legacies, are quite immaterial in reference to pecuniary charges on *real* estate), the legacy is contingent; and if B. dies before he attains his majority, the charge becomes extinguished in the land: *Lady Pawlett* v. *Lord Pawlett*, 1 Vern. 204; *Smith* v. *Smith*, 2 Vern. 92; *Jennings* v. *Looks*, 2 P. W. 276; *Phipps* v. *Lord Mulgrave*, 3 Ves. 613. [See 1 Jarm. Wills, 756; *Brown* v. *Wooller*, 2 You. & C. C. C. 134.]

A legacy, however, to be paid out of land when the devisee *of the land* attains a particular age, is evidently postponed for the convenience of the estate, in order that such devisee may, in the meantime, be free from the burthen; and therefore the death of the devisee of the money before the time of payment does not affect the charge: *Sherman* v. *Collins*, 3 Atk. 319 (*a*). And the same considerations obviously apply to a legacy out of land, which is directed to be paid within twelve months, or any other such definite period after the testator's decease: *Wilson* v. *Spencer*, 3 P. W. 173; *Cowper* v. *Scott*, Id. 119.

VESTING OF PERSONAL LEGACIES.

3. *As to the Vesting of Legacies of Personalty.*

The vesting of personal legacies admits of some distinctions borrowed from the civil law, which have not obtained a reception in regard to real estate, being the result of doctrines introduced by the Ecclesiastical Courts, who possessed and still possess, concurrently with Courts of Equity, a jurisdiction over executors as well as administrators, (whose authority emanates from them), for the recovery of legacies, and distributive shares of personal estate.

Leading distinction.

One principal distinction applicable to pecuniary legacies is, that, where futurity is annexed to the *substance* of the gift, the vesting is in the meantime suspended; but, where the *time of payment* only is future, the legacy vests instanter. Thus, where a legacy is given to a person at the age of twenty-one years; *Onslow* v. *South*, 1 Eq. Ca. Ab. 295, pl. 6; *Cruse* v. *Barley*, 3 P. W. 20; or at the expiration of ten years from the decease of the testator; *Snell* v. *Dee*, 2 Salk.

(*a*) Lord Hardwicke seems to have doubted whether the death of the devisee *of the land* before the age would not have defeated the legacy. But see ante, p. 209.

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415; the vesting, and not the payment merely, is deferred; and, consequently, if the legatee dies before the arrival of the period in question, the legacy fails. But, if the legacy is given to the legatee *to be paid* at the age of twenty-one years, or within ten years after the testator's decease, the legacy vests immediately, and the death of the legatee before the time of payment will not affect his title: *Cloberry* v. *Lampen*, 2 Ch. Cas. 155, 2 Freem. 24; *Stapleton* v. *Cheele*, 2 Vern. 673; *Harvey* v. *Harvey*, 2 P. W. 21; *Jackson* v. *Jackson*, 1 Ves. sen. 217 (*a*). A striking example of this construction occurs in the case of *Sidney* v. *Vaughan*, 2 B. P. C. Toml. ed. 254, where a testatrix bequeathed to A. 100*l.*, *to be paid* to him within six months after he should have served his apprenticeship, to which he was then bound. A. did not serve out his apprenticeship, but ran away from his master, and after the expiration of the term died intestate. It was held, by the House of Lords, (confirming a decree of the Court of Chancery of the Glamorganshire Great Sessions), that A.'s administratrix was entitled to the legacy, with interest from the expiration of the six months.

[In *Chaffers* v. *Abel*, 3 Jur. 577, where a testator bequeathed certain sums of stock to trustees to pay 40*l.* per annum to his daughter for life, and after her decease "to pay, assign, and transfer the sum of 1000*l.* stock equally amongst all and every the child and children of his said daughter, share and share alike, to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years;" and directed that the yearly interest and dividend of the said sum of 1000*l.* should, after the decease of his said daughter, be applied for the maintenance and education of her children. At the death of the testator, the daughter had four children, one of whom died before the youngest attained twenty-one; the youngest only survived the daughter. Sir L. Shadwell, V. C., held, that the four children took vested interests in the stock.]

[In *Hammond* v. *Maule*, 1 Coll. 281, where the testator gave the interest of a sum of 1000*l.* to the mother for life, and directed that, after her death, the interest should be paid for the daughter's use until her majority, when the principal should be paid to her; Vice-Chancellor Knight Bruce held, that the legacy vested in the daughter; observing, "Where a legacy is given in terms importing a gift at a future time, but the whole fruit and produce of the legacy

(*a*) If no interest were payable on the legacy, the representative would be bound to wait until the legatee, if living, would have attained his majority; but, if it carried interest, he would be entitled immediately. See *Crickett* v. *Dolby*, 3 Ves. 13; *Feltham* v. *Feltham*, 2 P. W. 271.

Representative of deceased legatee, when entitled to receive pecuniary legacy.

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is, in the meantime, given to the legatee, it is generally the rule not to hold those words to be conditional, which, standing alone, would be conditional. That, I apprehend, has been much too long settled to be disturbed."]

Words of future division or distribution.

Words directing future division or distribution between two or more objects would seem to fall under the same consideration as a direction to pay; and therefore, where following a gift which would otherwise confer an immediate interest, do not postpone the vesting. Thus, a bequest to A. and B. of 3000*l.* Navy 5*l.* per Cent. Annuities, and all dividends and proceeds arising therefrom, *to be equally divided between them when they shall arrive at twenty-four years* of age, has been held to vest the stock immediately in the legatees: *May* v. *Wood*, 3 B. C. C. 478.

Legacy on uncertain event.

It seems, however, that even where the futurity is annexed to the payment or distribution only, yet, if such payment or distribution is deferred, not (as in the cases just noticed) until the lapse of a definite interval of time, which will certainly arrive, but until an event which may or may not happen, the effect is to render the legacy itself contingent. Thus, where a sum of 200*l.* was given to A., *to be paid* at her marriage, or three months afterwards, provided she married with consent, Lord Hardwicke, adverting to the distinction in question, held that A., having died unmarried, her representative could not claim the legacy: *Atkins* v. *Hiccocks*, 1 Atk. 500. But see *Booth* v. *Booth*, 4 Ves. 399, post, 306.

Rule where the only gift is in the direction to pay, &c.

It is to be observed, that, where the only gift is in the direction to pay or distribute, the case is not to be ranked with those in which the payment or distribution only is deferred, but is to be regarded as one in which time is annexed to the substance of the gift.

Thus, in a leading case, where a testator gave certain real and personal property to trustees, upon trust, in a certain event, to pay, apply, and transfer the same unto and amongst all and every the brothers and sisters of W. R. R., share and share alike, upon his, her, or their attaining twenty-five, if a brother or brothers, and if a sister or sisters at such age, or marriage with consent; and the trustees were authorised to apply the rents, profits, and interest, or so much as they should think proper, for the maintenance of such brothers and sisters in the mean time; Sir W. Grant, M. R., held, that this was not a case in which the enjoyment only was postponed; the direction to pay was the gift, and that gift was only to attach to children that should attain twenty-five: *Leake* v. *Robinson*, 2 Mer. 363.

So, where a testator left for his wife's use certain furniture, &c., adding, "which I desire may be distributed amongst our children, *on*

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the youngest attaining twenty-one years, at her and my executor's discretion, such part being nevertheless reserved for her own use as may be thought convenient, and at her death to be distributed as above directed;" Sir J. Leach, V. C., on the principle above stated, held, that children who died before the youngest attained twenty-one took no interest: *Ford* v. *Rawlins*, 1 Sim. & Stu. 328.

[See also *Taylor* v. *Bacon*, 8 Sim. 100. In the case of *Lang* v. *Pugh*, 1 You. & C. C. C. 718, the Court considered it doubtful, upon the particular wording of a will, whether personal property did not vest immediately in a legatee, although the gift was contained only in the direction to pay at twenty-one or marriage, and there was no disposition of the income during minority.]

Similarity in the rules governing the vesting of real and personal estate.

The difference which has been noticed to exist between the construction of devises and legacies must not be so magnified in the reader's apprehension as to induce the supposition, that, in construing the latter, the principles governing the vesting of interests in real estate are wholly discarded. On the contrary, the distinction between future gifts which are, and those which are not, preceded by a gift of the intermediate interest, justly deemed so important in determining the vesting of interests in real estate, may be traced through the cases fixing the construction of bequests of personalty. Thus, it is indisputably clear, that, where personal property is bequeathed to A. for life, and after his decease to B., B. takes an immediate vested interest: *Monkhouse* v. *Holme*, 1 B. C. C. 198; *Blamire* v. *Geldart*, 16 Ves. 314.

Occurrence of new words of gift.

And the occurrence of new words of gift in the ulterior disposition does not vary the construction. Thus, where a testator bequeaths personalty to trustees in trust for A. for life, adding, "and after her decease *then* I give," &c., this seeming postponement of the gift until the decease of A. does not prevent the immediate vesting: *Benyon* v. *Maddison*, 2 B. C. C. 75.

Words seemingly contingent referred to the determination of a prior interest.

So, it is well established, that where a legacy is given to a legatee, *if*, or *provided*, or *in case*, or *when* (for it seems not to be very material which of these words is used, see 6 Ves. 243), he attains the age of twenty-one years, *Atkinson* v. *Turner*, 2 Atk. 41; *Knight* v. *Cameron*, 14 Ves. 389, or marries; *Elton* v. *Elton*, 3 Atk. 504; such a legacy, standing alone and unexplained, is contingent, and will be wholly defeated by the legatee's death before the age or event in question. Yet, if the interest accruing in the interval between the death of the testator and the future period in question, is appropriated to the benefit of the legatee, it is held, in analogy to the doctrine of *Boraston's case*, that the words of futurity and contingency refer to

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the possession only, and that the gift amounts, in substance, to an absolute vested legacy, modified and parcelled out into two distinct portions or interests, not for the purpose of protracting the vesting, but diverso intuitu. On this principle, in the case of *Hanson* v. *Graham*, 6 Ves. 239, (which is a leading authority), where a testator gave to his grandchildren, A., B., and C., 500*l.* Four per Cent. Annuities a-piece, when they should respectively attain their ages of twenty-one years, or day or days of marriage, which should first happen, with such consent as therein mentioned; and directed that the interest of the said legacies should be laid out for the benefit of the grandchildren till they should attain their respective ages of twenty-one years, or day or days of marriage; Sir W. Grant, M. R., held the legacies to be vested at the death of the testator, his Honor expressly intimating, that, if the construction had depended upon the first words, detached from the subsequent clause giving the interest, his conclusion would have been different. See also *Branstrom* v. *Wilkinson*, 7 Ves. 421.

So, in the case of *Lane* v. *Goudge*, 9 Ves. 225, where a testator bequeathed the residue of certain stock to A., for A.'s second daughter that he should have born, for her education, till she should attain the age of twenty-one years: and after she should attain to the age of twenty-one years, the testator gave the said interest to her and her heirs, for ever, she being christened Z. The second daughter was christened Z., and was held to be absolutely entitled, though she died at seventeen. See also *Love* v. *L'Estrange*, 5 B. P. C. Toml. ed. 59; but see *Batsford* v. *Kebbel*, 3 Ves. 363, a case which has always appeared to the Editor a very questionable authority.

Gift of interest favours vesting.

A gift of interest, eo nomine, obviously is difficult to be reconciled with the suspension of the vesting, because interest is a premium or compensation for the forbearance of principal, to which it supposes a title; but this consideration applies with little, if any, force to a provision for maintenance *out of* the interest: *Pulsford* v. *Hunter*, 3 B. C. C. 416. See also *Leake* v. *Robinson*, 2 Mer. 387. If, however, the *entire* interest is applicable to maintenance, the argument in favour of the vesting exists in its full weight: *Fonnereau* v. *Fonnereau*, 3 Atk. 645; *Heath* v. *Heath*, 2 B. C. C. 4.

Maintenance as *a distinct gift* does not favour vesting.

[Where maintenance is a distinct gift without reference to the application of the interest, it has no effect upon the vesting of the legacy. Thus, in *Watson* v. *Hayes*, 5 Myl. & Cr. 125, where there was a direction to executors to apply 25*l.* per annum for the maintenance of the testator's natural daughter till twenty-one or marriage, which should first happen, when his executors were thereby required to pay

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to her 500*l.*; and she died under twenty-one and unmarried. Lord Cottenham held that the legacy failed. His Lordship observed: "There is no gift of the 500*l.* except in the direction to the executors to pay that sum to the daughter when she shall attain twenty-one or be married. Here is the word 'when' distinctly applied to the gift itself, and not to the time of payment, to which Sir W. Grant's judgment in *Hanson* v. *Graham*, (6 Ves. 239), is therefore directly applicable; and there is also the absence of any terms of gift, except in the direction to pay at a given time, which never arrived, or upon a given event, which never took place, to which Sir W. Grant's observations in *Leake* v. *Robinson* (2 Mer. 363, see p. 387) directly apply, and which doctrine has been frequently recognised as a settled rule. This case appears to me to come so clearly within those rules, that I cannot think that any doubt would have been entertained as to this legacy having failed by the death of the legatee in infancy, if the question had not been supposed to be affected by the gift of the 25*l.* per annum, for its maintenance and education. It is well known, that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle, that it is the gift of the whole interest which effects the vesting of the legacy. Such was the opinion of Sir W. Grant in *Hanson* v. *Graham* and *Leake* v. *Robinson*, and recognised by Sir J. Leach in *Vawdry* v. *Geddes*, (1 Russ. & Myl. 203). It is, therefore, the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise, whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy. In this case, 25*l.* per annum out of the proceeds of the real and personal estate, after investment in real or Government securities, is directed to be paid quarterly for the maintenance and education of the daughter till twenty-one or marriage, when the 500*l.* is to be paid. That the testator fixed upon the sum of 25*l.* per annum as interest at 5*l.* per cent. upon 500*l.* is probable, but it is clearly not given as interest upon that sum. The gifts are perfectly distinct, and the title to the 25*l.* per annum could not be affected by the interest upon 500*l.* not amounting to 25*l.* In *Batsford* v. *Kebbell*, (3 Ves. 363), Lord Rosslyn, there being no gift except in the direction to pay at a certain age, held the legacy not vested before that time, although the legacy was of 500*l.* 3*l.* per Cents., and there

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was a direction to pay the dividends upon 500*l.* 3*l.* per Cents. to the legatee, until he should attain the age at which the stock was to be transferred to him. That case necessarily includes and governs that now before me. I am, therefore, of opinion, that this gift of 25*l.* per annum cannot be considered as interest upon the 500*l.* so as to effect the vesting of the legacy, and, consequently, that even supposing the legacy to have been payable out of the personal estate, it failed by the death of the legatee under twenty-one and unmarried; but if, as seems probable from the language of the will, the legacy, if payable, would have been to be raised out of the real estate, no ground would remain upon which any argument could be rested in favour of the vesting. The decree of the Vice-Chancellor must, therefore, be varied, by declaring that this legacy of 500*l.* lapsed by the death of the legatee under twenty-one and unmarried."]

Effect where principal and interest are blended.

Where the principal and interest are so undistinguishably blended in the bequest that both must vest or both be contingent, of course no argument in favour of the vesting of the principal can be drawn from the gift of the interest. Thus, where a testator gave to each of the daughters of K., "as soon as they attain the age of twenty-one years, the sum of 200*l.*, with interest at the rate of 5*l.* per cent. per annum," Sir J. Leach, V. C., held, that there was no gift either of principal or interest until the daughter attained twenty-one: *Knight* v. *Knight*, 2 Sim. & Stu. 490. But a direction subjoined to a simple bequest of stock, that the "interest" shall be added to the "principal," till the legatee attains twenty-one, has been held not to suspend the vesting, though there were vague expressions in the residuary clause of the testator's expectation that the annuities might fall in: *Stretch* v. *Watkins*, 1 Madd. 253.

Vested interest under future direction to pay.

The rule, that, where the only gift is in a future direction to pay, the time of payment is annexed to the substance of the gift, is to be taken in subordination to the doctrine which negatives the postponement of the vesting, when the futurity of the gift is referable to the circumstances of the estate. Thus, if a sum of money is bequeathed to A. for life, and after his decease to trustees, upon trust to pay thereout certain legacies; though there is literally no direction to pay these sums until the death of the legatee for life, yet, as the payment is evidently deferred for the purpose of letting in the prior life interest, the pecuniary legatees take vested interests immediately on the death of the testator, which devolve to their representatives in the event of their dying during the life of A.: *Monkhouse* v. *Holme*, 1 B. C. C. 298.

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[In the case of *Saunders* v. *Vautier*, Cr. & Ph. 240, a testator, by his will, bequeathed to his executors and trustees all the East India Stock which should be standing in his name at his death, upon trust to accumulate the dividends until D. W. V. should attain twenty-five, and then to transfer the principal, together with such accumulated dividends, to D. W. V., his executors, administrators, or assigns absolutely. The will also contained a residuary bequest. At the time of the testator's death, a sum of 2000*l.* East India Stock was standing in his name. Lord Cottenham, C., held that D. W. V. took an immediate vested interest in that legacy, although he was a minor at the testator's death; and ordered the stock, with its accumulations, to be transferred to him on his attaining twenty-one. His Lordship observed: "It is argued, that the testator's great nephew, Daniel Wright Vautier, does not take a vested interest in the East India Stock before his age of twenty-five, because there is no gift but in the direction to transfer the stock to him at that age. But is that so? There is an immediate gift of the East India Stock; it is to be separated from the estate and vested in trustees; and the question is, whether the great nephew is not the cestui que trust of that stock. It is immaterial that these trustees are also executors; they hold the East India Stock as trustees, and that trust is, to accumulate the income till the great nephew attains twenty-five, and then to transfer and pay the stock and accumulated interest to him, his executors, administrators, or assigns. There is no gift over; and the East India Stock either belongs to the great nephew, or will fall into the residue in the event of his dying under twenty-five. I am clearly of opinion that he is entitled to it. If the gift were within the rule, there would be circumstances to take it out of its operation. There is not only the gift of the intermediate interest, indicative, as Sir J. Leach observes in *Vaudry* v. *Geddes*, 1 Russ. & Mylne, 203, of an intention to make an immediate gift, because, for the purpose of the interest, there must be an immediate separation of the legacy from the bulk of the estate; but a positive direction to separate the legacy from the estate, and to hold it upon trust for the legatee when he shall attain twenty-five. The decision in *Vaudry* v. *Geddes* and other cases, in which there were gifts over, cannot affect the present question. *Booth* v. *Booth*, 4 Ves. 399, is certainly a strong case, and goes far beyond the present, and so does *Love* v. *L'Estrange*, 5 Bro. P. C. 59; and it is a decision of the House of Lords. That case has many points of resemblance to the present; and although Lord Rosslyn seems, in *Monkhouse* v. *Holme*, 1 Bro. C. C. 298, to question the principle of that decision, Sir W. Grant, in *Hanson* v. *Graham*,

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6 Ves. 239, justifies it upon grounds, most of which apply to this case, particularly that the fund was given to trustees till the legatee should attain a certain age, and that it should then be transferred to him; from which and other circumstances he thought it was to be inferred, that the fund was intended wholly for the benefit of the legatee, although the testator intended that the enjoyment of it should be postponed till his age of twenty-four. Such, I think, was clearly the intention of the gift in this case."]

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4. *Vesting of Residuary Bequests.*

It has been generally thought that a very clear intention must be indicated in order to postpone the vesting of a residuary bequest, since intestacy is often the consequence of holding it to be contingent, or rather *may be* its consequence; for, in solving questions of construction, we must look indifferently at actual and *possible* events. Thus, where a testator gave to trustees all his real and personal estate upon trust for sale; and, as to one moiety of the produce, for the benefit of his daughter A., during her life; and after her decease, upon trust to pay to her husband B. an annuity of 100*l.* during his life, and to apply the remainder of the annual income of the said moiety for and towards the maintenance of all and every the child and children of A. for and until they should severally attain his, her, and their ages or age of twenty-one years; and as to all the said principal monies or produce of the testator's said real and personal estate, *as and when they, and each and every of them, should attain his, her, and their respective age and ages of twenty-one years*, in trust to pay and dispose of the same unto and amongst all and every *such* child and children. A. had two sons, both of whom died under twenty-one; and Lord Gifford, M. R., held, that they respectively acquired vested interests, his Lordship adverting to the circumstances that it was a gift of a residue, and that the yearly income was given to the children until the age in question: *Jones* v. *Mackilwain*, 1 Russ. 220. The last case was decided principally on the authority of *Booth* v. *Booth*, 4 Ves. 399, which has been justly considered as a strong decision in favour of the vesting of residuary bequests, as will appear by the following brief statement of it:—A testator bequeathed the residue of his estate to trustees, upon trust to pay the dividends equally between his great nieces A. and B., until their respective marriages; and from and immediately after their respective marriages to transfer their respective moieties; and Sir R. P. Arden, M. R., held that A. acquired a vested interest, although she died

Residue to be transferred at marriage, held a vested interest.

without ever having been married; his Honor relying much on the circumstance that it was a bequest of residue (*a*).

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After clear immediate gift, vesting not postponed by equivocal words.

It seems, that where the testator has first given the residue in terms which would beyond all question confer a vested interest, the addition of subsequent equivocal expressions of a contrary tendency will not suspend the vesting. Thus, where A. by his will gave unto the children of his sister the whole of his real and personal estate, (subject to certain legacies), and afterwards expressed his desire that the children should be educated with the yearly interest of whatever portion of his estate might fall to each child's lot or share; *and such portion not to be otherwise claimed and inherited, directly or indirectly, until the children arrived at the age of twenty-two years*, whether married or single; Sir R. P. Arden, M. R., held, that the subsequent vague words were not sufficient to control the prior clear words; but the meaning was, that the legacy should be absolute, and that the legatee should not have the command of the principal till the age of twenty-two. See also *Stretch* v. *Watkins*, 1 Madd. 253. So, where a testator, after disposing of his real and personal estate in strict settlement, added a direction that none of the devisees should take or come into possession before the age of twenty-five, this was held to be confined to the actual possession, and not to postpone the vesting: *Montgomerie* v. *Woodley*, 5 Ves. 522.

But subsequent words may be explanatory.

But where terms of the original gift, embracing a class, are ambiguous in regard to the vesting, a clear intention to suspend the vesting manifested in the gift to a single object, will be decisive of the construction; since it is highly improbable that the testator should have had a different intention concerning a plurality of objects and an individual object. Thus, where a testator gave the residue of his estate, real and personal, to trustees: as to one-third, in trust for his daughter S. for life, and, after her decease, for the child or children of his said daughter, if more than one, share and share alike; to be paid, assigned, and transferred to them by his trustees, upon their respectively attaining the age of twenty-five years; but in case S. should leave but one child her surviving, then the whole of such one-third part should become the property of such only child, upon his or her attaining the age of twenty-five years, and be transmissible to his or her heirs, executors, or administrators. And in case his said daughter should leave no child her surviving, or in case she should leave a child or children who should not attain the age of twenty-five

(*a*) By comparing this case with *Atkins* v. *Hiccocks*, 1 Atk. 500, ante, p. 300, the reader will perceive how much stronger is the inclination to favour the vesting of residuary gifts than that of pecuniary legacies.

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years, then over.—Sir L. Shadwell, V. C., held, that the gift, in case the daughter should leave one child only her surviving, was clearly contingent on that child attaining the age of twenty-five; and the same construction, he observed, must be put on the gift in case she should have more than one: *Judd* v. *Judd*, 3 Sim. 525.

Attainment of particular age made a qualification of the devisees.

The vesting is necessarily postponed where the attainment to a particular age is interwoven into, and made an essential ingredient in the qualification of the objects of the gift, as where it is to such children as shall attain, or to the children who shall attain (*a*), &c. Thus, where a testator devised his real estates to trustees, in trust for M. for life, and after her decease to convey the same unto and among all and every the child and children of M., *who should live to attain the age of twenty-three years*, and to his, her, and their heirs and assigns for ever, as tenants in common; and if there should be but one such child, then to such only child, his or her heirs and assigns for ever. And in case there should be no such child, or, being such, all should die under the age of twenty-three, then over—it was held, that those children alone who attained the age of twenty-three were to take; and therefore the gift was void for remoteness: *Bull* v. *Pritchard*, 1 Russ. 213. [See Mr. Jarman's remarks on this case, 1 Jarm. Wills, 772.]

Gift on attaining certain age held contingent.

And, in several instances, gifts to children *on their attaining* a certain age have received a similar construction, even in spite of some circumstances apparently favourable to the immediate vesting. As, where a testatrix gave the residue of her estate and effects equally between her four sisters; and directed that, on the death of her sisters, the interest of their respective shares should, at the discretion of her executors, be applied in the maintenance and education, or accumulate for the benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years; *and upon any of their attainment to that age, they should be entitled to their proportion of their mother's share of the principal;* and in case of any of their decease under that age, leaving lawful issue, such issue should be entitled to their respective parent's share, at such time as such parent would have been entitled, if living, thereto. There was also a bequest in favour of the other children, in case of death under twenty-two without issue; and a bequest over of the entirety in case all the children should die without issue, or, being such, they should die before the principal of their respective *shares* should become *payable*.—Sir J. Leach, M.R., held, that the vesting

(*a*) This seems to be the most correct mode of framing such gifts.

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was postponed until the age of twenty-two, and therefore that the gift was too remote. His Honor thought that the case was governed by *Leake* v. *Robinson*, and intimated an opinion, that even if the income had been expressly given to the children until they attain twenty-two, the shares would not have vested; for, the presumption that the testator means an immediate gift, because the entire subject, including such interest, is separated from the bulk of the estate, failed entirely, when the testator had expressly given the legacy over, in the event of the death of the legatee before a particular period: *Vawdry* v. *Geddes*, 1 Russ. & M. 203.

Remarks on the case of *Vawdry* v. *Geddes*.

But did not the gift over, to which his Honor here alludes, suggest a strong argument for the immediate vesting? Where a testator directs, that, on a given event, the "shares" of the legatees shall go in a certain manner, an inference seems to be afforded, that, in the alternative event, the property is to belong to the legatees. The adjudged construction rendered the terms of the clause of *substitution* (for such it clearly was,) inaccurate throughout. And a similar observation applies to the earlier cases of *Mackell* v. *Winter*, 3 Ves. 236; and *Barker* v. *Lea*, Turner & Russ. 413; in both which residuary bequests to children on their attaining a particular age were held to be contingent in the interim, though in each case there was a bequest over, in the event of the legatee's dying before the prescribed age; and, in the former, the postponement seemed to refer to the payment rather than to the gift. In these cases, the leaning, often avowed, to the vesting of residuary bequests, was but very faintly discernible, and one cannot help suspecting that the judgment of the Court was somewhat biassed by the events which had happened, and which rendered the adopted construction convenient. Had intestacy been produced (as it might have been,) by the postponement of the vesting, there is little doubt that the adjudication would have been different. [See further, Mr. Jarman's observations on the case of *Bland* v. *Williams*, 3 Myl. & K. 411, in 1 Jarm. Wills, 776.]

As to contingent transmissible interests.

It is to be observed, that, whenever vesting is postponed to a certain age, the attainment of that age is made, in *fact*, (though possibly not in *expression*), part of the qualification of the objects of the gift; and death, before its arrival, has the effect of striking the name of the deceased person out of the list of presumed objects. Hence, the *contingent* interest of those persons can never be transmitted to representatives. Where, however, the contingency on which the vesting depends is a *collateral event*, the death of such legatee, pending the contingency, has no other effect than that of substituting the

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legatee's representative for himself. Thus, where a testator bequeaths his personal estate to A., and if he shall die without leaving issue at the time of his decease, then to B.; in the event of B. dying in the lifetime of A., testate or intestate, his contingent or executory interest will belong to his executor or administrator: *Pinbury* v. *Elkin*, 2 Vern. 758; *King* v. *Withers*, Cas. temp. Talb. 117, 3 B. P. C. Toml. ed. 135; *Wilson* v. *Bayly*, 3 B. P. C. Toml. ed. 195; *Barnes* v. *Allen*, 1 B. C. C. 181.

[As to the transmissibility of a residue, see Vice-Chancellor Wigram's judgment in *Leeming* v. *Sherratt*, 2 Hare, 14, in which case, upon the construction of a gift of a residue of real and personal estate to trustees to sell the freehold property and to get in all the personal property, and to pay and divide the money arising therefrom unto and equally among the testator's children as soon as the youngest should attain twenty-one; one-half of the daughter's shares to be placed out at interest and secured; the interest to be paid to such daughter, and the principal to be disposed of amongst her children as she might direct; if no child, such share to be divided equally amongst the survivors of the testator's children; and, in case of the death of any of his children, leaving lawful issue, the testator gave to such issue the share the parent so dying would have been entitled to have;—it was held, that the residuary share of a child who attained twenty-one, and died before the time of division, passed to his representatives. See also *Pye* v. *Linwood*, 6 Jur. 618.]

[In *Packham* v. *Gregory*, 9 Jur. 175, 4 Hare, 396, where a testator, by his will, gave the residue of his personal estate, upon trust to invest the same and pay the interest arising therefrom to his wife for life if she should so long continue his widow; and, after her death or marriage, then upon trust to pay and divide the whole of the money so directed to be invested unto and equally amongst all and every his nephews and nieces, share and share alike, within six months after they became entitled thereto; Vice-Chancellor Wigram held, that the residuary share of a nephew who died in the lifetime of the tenant for life passed to his representatives. His Honor observed:—"I have not the least doubt about the case. The question arises on the residuary clause of the will of the testator. By that residuary clause he bequeathed as follows:—[His Honor read the clause from the will.] It is not to pay at the expiration of six months, but within six months after they shall become entitled thereto. It was said, that one of the nephews having died in the lifetime of the tenant for life, that party had no interest; the argument being, that this was a future gift, commencing at the time when the parties should become entitled

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to it. The argument depended entirely on the force of the direction, that the trustees should pay and divide; and it was said, that these words 'pay and divide' imported a gift in this case. I had to consider that in the case of *Leeming* v. *Sherratt*, (2 Hare, 34), where, after very carefully examining all the cases upon it, the observation I made was this—I read this, for, although it is no authority for me, yet it is the expression of an opinion very deliberately formed, and to which I still adhere. The passage in the judgment is as follows:—'It was said that the gift of residue is future; that there is no gift of such residue, except in the direction to pay; and that it is a settled rule in the construction of wills relating to personal estate, that, where a legacy is given at a future time, and there is no gift of the legacy, except in the direction to pay, the legatee can claim nothing unless he is living at the time when the legacy becomes payable. That the Court has in many cases expressed itself very nearly in this manner, I do not deny; but I am satisfied that I should be misapplying the rule intended to be expressed by the Court in such cases, if I were to hold that John's share of the residue was not transmissible to his representatives, only because he died before the testator's youngest child attained twenty-one. The rule of construction referred to (as I understand it) is simply this: Courts of equity, in the construction of wills relating to personal estate, follow the rules of the civil law. By that law, when a legacy is given absolutely, and the payment is postponed to a future definite period, the Court considers the time as annexed to the payment, and not to the gift of the legacy, and treats the legacy as debitum in præsenti solvendum in futuro.' Now, in that case, I explained what appeared to me the principle of the case, and I endeavoured to shew that the authorities confirmed my view, that there was no magic in the words 'pay and divide' in the direction. It is a question of substance, and may be thus stated: If there is a gift to a person at twenty-one, or on the happening of any event, as occurred in the case of *Leake* v. *Robinson*, where there was a gift to persons upon their attaining twenty-five; or a direction to pay and divide when a person attains twenty-one, (all the cases fall under the same rule), there, the gift being to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of it. There is no gift except in the direction, or in the direction to pay, or to pay and divide. The testator has made use of that mode of expressing what is much more clearly expressed in most of the cases. It is a gift to a person answering a particular description, or on the happening of a particular event. But, if upon the whole will it appears

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that the future gift is only postponed to let in some other interest, the same reasoning has never been applied to it. If it appears, upon the construction of the will, that a future interest is only postponed for the benefit of the estate, (that is the way the Court expresses it), in that case the interest is vested, notwithstanding it is said that it is a future interest. In *Salisbury* v. *Petty*, 3 Hare, 86, 7 Jur. 1011, I had a somewhat similar question before me, but I did not go into it. I was there referred to dicta which supported that view of the case. I was not aware that Mr. Jarman had expressed the point so clearly as he has done, and I entirely agree with his observations in the first volume of his Treatise on Wills, p. 763. He there, in the first place, states the cases in which the gift is held to be contingent, because given to a person answering a particular description. He then puts this case: 'But, even though there be no other gift than in the direction to pay or distribute in futuro, yet, if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. Thus, where a sum of stock is bequeathed to A. for life, and after his decease to trustees, upon trust to sell, and pay and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D.; as the payment or distribution is evidently deferred until the decease of A., for the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator. On the same principle, the mere introduction into an ulterior gift of new words of disposition has no effect in postponing the vesting.' Then he goes on to state the cases, but not stating all the cases to which I was referred in *Leeming* v. *Sherratt*."]

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XIV. Gifts to children, issue or descendants, brothers and sisters, nephews, nieces, and cousins.

1. *Description of Persons included.*

Children of several marriages.

A gift to children generally (*a*) includes children by any marriage, past, present, or future, (see *Salkeld* v. *Vernon*, 1 Eden, 64; *Malim* v. *Keighley*, 2 Ves. jun. 333); and will not be confined to children of an existing marriage, merely on conjectural grounds, such as that of the testator being a relation of the husband or wife of the parent in question, still less from his describing the mother as the wife of

(*a*) But as to younger children, vide post.

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A. B. And even, where a testator bequeathed to the children of his niece, the wife of A., declaring that the dividends should be applied for maintenance, *without any regard to the ability of their father*, Lord Eldon considered this expression to be insufficient to exclude the children of a second marriage; at the same time intimating his private opinion to be, that the testator never contemplated the event of his niece marrying again: *Barrington* v. *Tristram*, 6 Ves. 345.

So, in a subsequent case, Sir J. Leach, M. R., held, that a bequest to the children of the testator's daughter was not restrained to her children by her then husband, by the testator having required *his* consent as well as *her's* to the marriage of the children, there being a general gift over in case of the daughter dying *without leaving issue behind her*, which was considered to negative the restricted construction: *Critchett* v. *Taynton*, 1 Russ. & M. 541. The effect, of course, would be to read the requisition of the then husband's consent as not being co-extensive with the whole class embraced by the gift, but as applying only to that portion of it of which he was the parent.

Gifts to children not extended to grandchildren.

A gift to issue of one degree is, generally speaking, incapable of being extended to issue of another degree. Thus, a gift to children will not apply to grandchildren, though it was formerly considered, that, if there was no child, grandchildren might take; (2 Vern. 106, 1 Ves. sen. 201); and in the case of *Earl of Orford* v. *Churchill*, 3 Ves. & Bea. 69, Sir William Grant observed, that, "where there is a total want of children, grandchildren have been let in under a liberal construction of the word 'children.'" The case, however, did not require such a construction; and, upon reflection, it is probable that this excellent Judge would have perceived its incompatibility with that primary rule,—enforced by none more ably and energetically than himself,—which forbids the expounding a testator's intention by the light of subsequent events, and which principle requires that the word "children," like every other descriptive appellation, should not be diverted from its proper and established signification, unless circumstances, existing at the making of the will, shew that it could not possibly have been used in that sense. As, where a testator gives to the children of A., who was dead when the will was made, leaving grandchildren but no child; probably in this case, and presuming the facts to be known to the testator, the bequest might be held to comprise the grandchildren. See *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419.

But it has been expressly decided, that, under a bequest to the children of five persons, described as the testator's *late* brothers and

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sisters, the grandchildren of one of the five, *who was* then *dead, leaving grandchildren but no child*, could not take concurrently with the children of the other four; since, to have included them, would have involved the incongruity of reading the word "children" in two different senses: *Radcliffe* v. *Bulkeley*, 10 Ves 195. The reasoning which excludes grandchildren from taking under a bequest to children, of course, would apply to the claim of great grandchildren to be objects of a gift to grandchildren; and Lord Northington's dictum in *Hussey* v. *Berkeley*, 2 Eden, 196, in favour of such claim, is not to be relied on. [In the *Earl of Orford* v. *Churchill*, 3 Ves. & Bea. 69, Sir W. Grant determined that great grandchildren were not comprehended under the description of children and grandchildren, although in *Hussey* v. *Berkeley*, 2 Ed. 196; *Hussey* v. *Dillon*, Amb. 603, *S. C.*, Lord Northington had intimated an opinion that grandchildren might be read as a popular expression for all descendants more remote than children. But, in that case, the context shewed that the testator used the word in that sense; as to which, however, see *Shelley* v. *Bryer*, Jac. 207, where the erroneous use of the word in one part of a will was held not to put a construction upon the same word in another part; and *James* v. *Smith*, 14 Sim. 214, where the testatrix having given a legacy to her "niece, M. M., daughter of my nephew, T. M.," it was held that the children of nephews and nieces might take under a gift of the residue to her nephews and nieces. There the testatrix shewed that she knew the true nature of the relationship, which did not appear in *Shelley* v. *Bryer*.]

Gift to children and grandchildren not extended to great grandchildren unless explained by context.

[It has been held, that "first cousins, or cousins german," does not include the descendants of first cousins: *Sanderson* v. *Bayley*, 4 Myl. & Cr. 56; and in *Waring* v. *Lee*, 8 Beav. 247, a bequest to nephews and nieces, grand-nephews and grand-nieces, in such shares, and subject to such trusts, intents, and purposes, as the testator's widow should appoint, was held not to authorise an appointment to a grand-niece for life, with remainder to her children.]

First cousin does not include descendants of cousins.

It has been decided, that a great-niece cannot take under a gift to nephews and nieces, though subsequently, in a codicil, described by the testator as his niece; and the circumstance that no niece was living at the testator's death was held not to vary the construction, for the conclusive reason assigned by the Master of the Rolls (Sir T. Plumer), that nieces *might* have been born: *Shelley* v. *Bryer*, Jac. 207.

Gift to nieces not extended to great-nieces.

It has been held, that a legacy to first and second cousins, includes first cousins once removed; the intention being, it is considered, to give to relations not more remote than second cousins: *Mayott* v.

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Mayott, 2 B. C. C. 125. And this was recently extended to first cousins twice removed; *Silcox* v. *Bell*, 1 Sim. & Stu. 301; and the fact that the testator has additionally mentioned a class of relations whom this liberal construction of the term "first cousins" includes, does not restrict it: *Charge* v. *Goodyear*, 3 Russ. 140.

Half brothers and sisters.

It has never been decided whether a gift to brothers and sisters extends to brothers and sisters of the half-blood, (see 2 Mer. 363); but the affirmative is not to be doubted. It is well known that relations of the half-blood are within the Statute of Distributions; and, consequently, are included in a gift to relations: *Cotton* v. *Scarancke*, 1 Madd. 45.

[Gifts to relations do not, unless explained, include relations by affinity, so that a grandson's widow cannot take under a gift to grandchildren: *Hussey* v. *Berkeley*, 2 Ed. 194.]

Descendants or issue.

A gift to descendants, or issue, (which seem to be co-extensive terms), will comprise descendants of every degree, (*Cook* v. *Cook* (*a*), 2 Vern. 545; *Crosley* v. *Clare*, 3 Swanst. 320, n., Amb. 397; *Wyth* v. *Blackman*, 1 Ves. sen. 196, 3 Ves. 258; *Wythe* v. *Thurston*, Amb. 555, *S. C.*; *Pierson* v. *Garnet*, 2 B. C. C. 38, 230; *Butler* v. *Stratton*, 3 B. C. C. 369; *Bernard* v. *Mountague*, 1 Mer. 422), unless narrowed by the context. The word "issue" has been held to be restrained to children by a clause referring to their taking their *parents'* shares: *Sibley* v. *Perry*, 7 Ves. 522. [See *Slater* v. *Dangerfield*, 15 Mee. & W. 263, where, however, it was not necessary to decide more than whether the parties entitled, whether children or issue generally, took as purchasers.] Difficulty, however, often arises from the testator having used the words issue and children synonymously, rendering it necessary, therefore, in order to avoid the failure of the gift from uncertainty, that the prevalency of one should be established. Lord Hardwicke thought, that, where the gift was to several, or the respective *issues* of their bodies, in case any of them should be dead at the time of distribution, viz. to each, or their respective *children*, one-fourth, the word children was not restrictive and explanatory of "issue" previously mentioned: *Wyth* v. *Blackman*, 1 Ves. sen. 196, 3 Ves. 258. See also *Royle* v. *Hamilton*, 4 Ves. 437; *Dalzell* v. *Welsh*, 2 Sim. 319; [*Cursham* v. *Newland*, 2 Scott, 105, 2 Beav. 145, 4 Mee. & W. 104; *Clay* v. *Pennington*, 7 Sim. 370, 6 Law J., N. S., Ch. 183. See also 2 Jarm. Wills, 37.]

(*a*) [See Mr. Jarman's remark on *Cook* v. *Cook*, 2 Jarm. Wills, 35.]

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2. *Mode of Distribution among Issue of various Degrees.*

Distribution per stirpes and per capita.

Wherever the devise or bequest comprises issue of several degrees, it should be distinctly shewn whether the objects are to take per capita or per stirpes. The different effects of these respective modes of distribution may be exhibited by the following supposed case—Gift to the issue or descendants of A. A. dies, leaving an only surviving child, who has no child, but A. has left three grandchildren, the children of a deceased child; a distribution per stirpes would occasion a division of the property into moieties, of which one would go to the surviving child, and the other to the three grandchildren. A distribution per capita would cause a division into four shares, of which the surviving child would take one, and the three grandchildren respectively the remaining three. Where the gift is to issue, or descendants simpliciter, it seems, that the latter construction prevails, and that all the objects take as joint tenants; *Davenport* v. *Hanbury*, 3 Ves. 257; unless the bequest contains words of severance, or other expressions, importing division or equality, which would make the legatees tenants in common, but would not further alter the construction: *Butler* v. *Stratton*, 3 B. C. C. 367; *Crosley* v. *Clare*, 3 Swanst. 320, n. [incorrectly reported in Amb. 397.]

On the same principle, it is clear, that if a testator, having living children, and also grandchildren, the children of a deceased son, makes a gift in favour of his children A. and B., and the children of his late son C., the distribution will be per capita and not per stirpes; for, though there may be plausible ground to conjecture that the testator intended the children of the deceased son to represent their deceased parent only, yet this, in the words of Lord Chancellor King, would be, "to go too much out of the will:" *Blackler* v. *Webb*, 2 P. W. 383 (*a*).

Where the distribution among descendants or issue is per capita, children take concurrently with their parents. Thus, under a gift to the issue or descendants of A., a person who has died leaving three children, B., C., and D., of whom B. has no child, C. has one child but no grandchild, and D. has no child but three grandchildren, the distribution would be into seven shares, of which B. would take one, C. and her child respectively two more, and D. and her three grandchildren the remaining four: *Freeman* v. *Parsley*, 3 Ves. 421.

(*a*) As to gifts to the children of several, vide post, Sect. xvi.

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And a bequest to such of the children of A., B., and C., as should be living at the testatrix's decease, or (which was turned into *and*) the issue of such of them as should be married, in equal shares, has also been held to cause a distribution per capita: *Horridge* v. *Ferguson*, Jac. 583. [And see *De Witte* v. *De Witte*, 11 Sim. 41, where a testator bequeathed the residue of his personal estate in trust for his daughter S. and her children, and it was held that the daughter and her children, living at the testator's death, were entitled to the residuary estate as joint tenants. See also *Heron* v. *Stokes*, 2 Dru. & War. 89; *Stokes* v. *Heron*, 12 Cl. & Fin. 161; and *Cunningham* v. *Murray*, 11 Jur. 814, 1 De Gex & Sm. 368.]

[In the recent case of *Abbay* v. *Howe*, 11 Jur. 765, where a testator bequeathed certain monies, after the death of a tenant for life of the interest thereof, unto and equally amongst all and every the children of S. W. and S. K. which should be living at the death of the said S. K., and the lawful issue of such of them as should be then dead, share and share alike, V. C. Knight Bruce held, that this was a gift per capita and not per stirpes.]

Whether children take per stirpes or per capita.

[In regard to the question of distribution per stirpes or per capita among children or other descendants of the *same degree*, Mr. Jarman has thus stated the rule in his Treatise on Wills, Vol. II., p. 111: "Where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take per capita, not per stirpes. The same rule applies where a devise or bequest is made *to a person* described as standing in a certain relation to the testator, and *the children* of another person standing in the same relation, as 'to my brother A. and the children of my brother B.;' in which case A. takes only a share equal to that of one of the children of B., though it may be conjectured that the testator had a distribution according to the statute in his view. And of course it is immaterial that the objects of gift are the testator's own children and grandchildren; as where a legacy was bequeathed 'equally between my son David and the children of my son Robert.' But this mode of construction will yield to a very faint glimpse of a different intention in the context." See *Dowding* v. *Smith*, 3 Beav. 541; *Tomlin* v. *Hatfield*, 12 Sim. 167.]

[Where the testatrix directed her trustees to divide the rents of her real estate equally between A., B., C., and D. (the widow of E.), until E.'s children attained twenty-one, and then to sell and divide the proceeds among A., B., C., and E.'s children in equal shares, but if D. married, her share was to be applied to the maintenance of E.'s children, it was held, that, as the testatrix had devoted one-fourth

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of the income only to the maintenance of E.'s children, it must be presumed that she intended them to take that share only among them, and not each an equal share with A., B., and C.; and a gift of the residue equally between A., B., C., and E.'s children was held to have the same meaning: *Brett* v. *Horton*, 4 Beav. 238. See *Blakelock* v. *Sharp*, 12 Jur. 819.]

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3. *Class entitled in Reference to the Period of Birth.*

1st. *Where the Gift is immediate.*
2nd. *Where it is preceded by a Life Interest.*
3rd. *Where Distribution is postponed to a certain Age.*
4th. *Words operating to restrict or enlarge the Class.*
5th. *Claims of Child en ventre sa mere.*
6th. *Rule applicable to Grandchildren, Brothers, &c.*

Where gift is immediate.

1st. An immediate devise or bequest to children (i. e. a gift to take effect *in possession* at the testator's decease),—whether of a person living, *Northey* v. *Burbage*, Pre. Ch. 470; *Hill* v. *Chapman*, 3 B. C. C. 391; or dead, *Viner* v. *Francis*, 2 Cox, 190, 2 B. C. C. 658; [*Doe* d. *Stewart* v. *Sheffield*, 13 East, 576; *Shuttleworth* v. *Greaves*, 4 Myl. & Cr. 35;] (but see *Martin* v. *Wilson*, 3 B. C. C. 324 [which is clearly not law]); whether the term be children simply, or *all* the children, *Heath* v. *Heath*, 2 Atk. 121; *Singleton* v. *Singleton*, 1 B. C. C. 542, n.; *Scott* v. *Harwood*, 5 Madd. 332; *Davidson* v. *Dallas*, 14 Ves. 576;—comprehends the children living at the testator's decease, and those only; [see also *Peyton* v. *Hughes*, 7 Jur. 311; *Leach* v. *Leach*, 2 You. & Coll. C. C. 495; *Cort* v. *Winder*, 1 Coll. 320.] But if no child is then living, it extends to all who *at any time* afterwards come into existence: *Weld* v. *Bradbury*, 2 Vern. 705; *Shepherd* v. *Ingram*, Amb. 448; *Haughton* v. *Harrison*, 2 Atk. 329; *Harris* v. *Lloyd*, Turn. & Russ. 310; [unless a designated person is associated in the gift with the class, so that he might take in common with them, in which case, if, at the time when the gift should take effect, there is no member of the class in existence, the person designated will take all: *Read* v. *Willis*, 1 Coll. 86. See the rule, where no object exists at the period of distribution, farther developed, 2 Jarm. Wills, 84 et seq.]

This adaptation of the construction to the event has not many parallel examples, and may be considered as exhibiting rather an exception to, than an illustration of, a general principle. It is clear, however, that the flexibility applies only to indefinite gifts, and not

to those which expressly mark out and designate the class of children intended. CLASS OF CHILDREN ENTITLED.

[This rule includes gifts to "A. and his issue," or to "A. and his children," where the context does not require a different construction, see the section post, "Rule in *Wild's case*."]

[When the gift is to such children as shall be living at A.'s death, and A. dies before the testator, it has been thought that the children, being ascertained at A.'s death, should be considered as personæ designatæ, so that the share of any one of them dying before the testator would lapse: *Allen* v. *Callow*, 3 Ves. 293. But the contrary has been decided in a recent case: *Lee* v. *Pain*, 4 Hare, 250.]

2nd. Where the devise or bequest is to a person for life, or for any other particular estate or interest, with an ulterior gift to children, the latter includes the objects living at the testator's death, and all who afterwards come in esse during the continuance of the estate for life, or other particular estate or interest: *Baldwin* v. *Karver*, Cowp. 309; *Devisme* v. *Mello*, 1 B. C. C. 537; *Middleton* v. *Messenger*, 5 Ves. 136; *Paul* v. *Compton*, 8 Ves. 375; *Meredith* v. *Meredith*, 10 East, 503; *Mogg* v. *Mogg*, 1 Mer. 654; *Leake* v. *Robinson*, 2 Mer. 363; *Odell* v. *Crone*, 3 Dow, 61 (*a*); [*Lenden* v. *Blackmore*, 10 Sim. 626; *Cooke* v. *Bowen*, 4 You. & Coll. 244; *Locker* v. *Bradley*, 5 Beav. 593.] Where preceded by a life interest.

This is a very convenient rule where the preceding interest is for the life of the parent, since it necessarily lets in every child who can come into existence. The entire property vests in the child or children, if any living at the testator's decease, with a liability to be divested pro tanto as the subsequent children are respectively born. [See *Watson* v. *Watson*, 11 Sim. 73; *Woodcock* v. *Renneck*, 4 Beav. 130; *Pye* v. *Linwood*, 6 Jur. 618; *Packham* v. *Gregory*, 9 Jur. 175.]

[The rule applies to executory gifts made to take effect in de-

(*a*) But see *Browne* v. *Groombridge*, 4 Madd. 495, where children born after the decease of the legatee for life, i. e. after the period of distribution, were held to be entitled. No reason is assigned for this novel construction, and it is impossible to suppose but that there is a mistake either in the report of the will, or of the judgment. [In his Treatise on Wills, Vol. II., p. 102, Mr. Jarman says, that in this respect, i. e. in letting in children born after the period of distribution, this decision is clearly untenable. It appears, however, from the language of the report "in manner as in the said will mentioned," that there were directions in the will, (probably as to the time of payment, &c.), which are not stated in the report. Indeed, the argument of counsel shews that the legacies, though vested immediately, were payable in futuro.]

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feazance of a prior gift: *Ellison* v. *Airey*, 1 Ves. sen. 111; *Stanley* v. *Wise*, 1 Cox, 432.]

Children need not be living at the time of distribution.

The rule which lets in children born down to the period of distribution, is often stated as if it required that they should be *living* at that period. See *Baldwin* v. *Karver*, Cowp. 309; *Ayton* v. *Ayton*, 1 Cox, 327, marg. note; *Bartleman* v. *Murchison*, 2 Russ. & M. 140, 1 Rop. Leg. 40, 45, (4th ed.), marg. note. It is sufficient, however, to establish the claim of any child, or of his representatives, that he was living at the death of the testator, or, subsequently, at *or before* the period of distribution or possession; and, to authorise a narrower construction, some restrictive terms must be elicited from the will.

Gifts of reversions.

It seems, that, where the postponement of distribution is occasioned by the reversionary nature of the property, there being a prior life-interest not belonging to the testator, children born before the reversion falls into possession are admitted precisely in the same manner as if the life-interest were created by the will: *Walker* v. *Shore*, 15 Ves. 122. But the mere charging with annuities the property bequeathed to the children, even by the same will, does not let in children born during the continuance of those annuities: *Singleton* v. *Gilbert*, 1 Cox, 68.

Effect where there is no object at the period of distribution.

Where the prior interest is not for the life of the parent of the children to whom the ulterior property is given, it is obvious that there may happen to be no child born until after the expiration of such interest; and then a question would arise as to the admission of such subsequently born child or children. On this point it is conceived, that the following distinctions may be gathered from the cases:—1st. That, if the subject of devise be the legal inheritance of freehold lands, as the ulterior devise to the children must take effect, if at all, as a remainder, it follows, from the rules applicable to this species of estates, that, unless some child is in esse before the preceding particular estate determines, the remainder will fail, by reason of the impossibility of its taking effect at the instant of the determination of the particular estate. Thus, if freehold lands of a testator are devised to A. for life, and after his decease to the children of B. in fee, and A. dies before B. has any child born, the remainder to the children will fail; and the same consequence would [before the stat. 8 & 9 Vict. c. 106, s. 8] have ensued if A.'s estate had ceased by forfeiture before B. had any child, unless the remainder had been preserved from destruction in this event by the usual limitation to trustees. But that, 2ndly, if the gift to the children be not subject to the rules governing contingent remainders,

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as if it be an executory devise, or a devise of copyhold lands, or of freeholds, in which the testator had the equitable inheritance only, or if it be personal estate; in any of these cases, it should seem, that, in the event of no child being in existence when the gift takes effect in possession, or rather having been in existence at some time since the decease of the testator, the effect of this event would be to let in the whole range of children at any time thereafter born. Thus, if lands are devised to A. in fee, and if A. dies under age and without issue, then to the children of B. in fee, and, in default of such children, to C. in fee; if A. should die under age, without leaving issue when B. has not a child born, the executory devise to such children would not be defeated by that event, but would take effect in favour of any child or children afterwards coming into existence: *Hutcheson* v. *Jones*, 2 Madd. 124; *Horseman* v. *Abbey*, 1 Jac. & W. 381.

[The observations of Lord Talbot, in the case of *Chapman* v. *Blissett*, Cas. temp. Talbot, 145, (where lands were devised to trustees upon certain trusts during the life of A., and after his decease as to one moiety in trust for the children of A., and as to the other moiety in trust for the children of B.; B. had no child born until after the decease of A.; and it was held, that such after-born child was entitled to the other moiety), are explanatory of this distinction: "But then it has been said, that when Isaac had a son born, the remainder vested in him, and, consequently, the limitations to the other became vested remainders likewise; and the remaindermen not being in rerum naturâ at the time of Isaac's death, this remainder can never arise. But, in regard to trusts, the rules are not so strict as at law; for, the whole legal estate being in the trustees, the inconveniency of the freehold's being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented, there being always a sufficient tenant to the præcipe; the defect of which was the sole mischief the law provided against. And even the reason is not now so strong as when real actions, which can be brought against the tenant of the freehold only, were more in use. The whole, therefore, being in the trustees, supports the several uses that are to arise out of their interest, which continuing in them until the birth of the plaintiff, whether it be taken as a future limitation or as a contingent remainder of a trust, is good either way." "The same doctrine," observes Mr. Jarman (Treat. on Wills, Vol. II. p. 89), "would seem to hold in regard to bequests of personal estate; to which it is obvious none of the rules governing contingent remainders are applicable." Mr. Jarman then enters into an examination of the case of *Godfrey* v.

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Davis, 6 Ves. 43, and concludes that the judgment of Sir W. Grant, M. R., was partly founded upon the particular circumstances of the case. See 2 Jarm. Wills, 89—92.]

Gift held to await the event of the birth of children.

It ought to be observed, that the cases from which the above conclusion has been drawn are far from numerous, and do not professedly authorise it, though they strongly tend to establish such a construction. It is tacitly recognised in the case of *Wyndham* v. *Wyndham*, 3 B. C. C. 58, where a testator bequeathed the residue of his estate to A. for life, but if she shall die leaving any child or children, then the trustees were to pay the principal to them; but if A. should die without any child or children, then he left the residue to the younger children of B. if he should have any, and if not, he left it to C. A. died without children before B. had any, and B. afterwards died without having had a child, and the question in this cause was, as to what became of the income in the interval between the deaths of A. and B.; which question of course assumes that the property did not go over to C. immediately on the death of A. without a child, but remained in expectancy during the whole life of B., to await the event of his having children. [See other cases stated, 2 Jarm. Wills, 93—96.]

The doctrine, however, of the cases in question may seem to be encountered by the case of *Bartleman* v. *Murchison*, 2 Russ. & M. 136, or rather by the principle of the reasoning of the Lord Chancellor in that case; for the case itself was distinguishable in this respect, that the gift was to an individual and not to a class. The bequest was of an annuity to A. for life, and after her decease to B. "*if a widow*, but not otherwise, but to revert back to any child or children after her death;" and it was held that B., who was married at the death of A., and *afterwards* became a widow, was not entitled; Lord Brougham observing—"Although, in construing bequests of personal, the same technical strictness does not prevail as in devises of real estate, the same rules are, to a great extent, applicable;" and then, after adverting to the construction of *bequests* to children, as comprehending the same persons as devises to these objects, his Lordship remarked—"It is only following out the same principle, to hold, *that a person to whom a legacy is given in a particular character, and by a particular description, shall not be entitled to it, unless he be clothed with that character, and answer that description, at the moment when the legacy might vest in possession.*"

[As to the extension to brothers and sisters, nephews and nieces, of the rule which makes a gift to children comprehend all who

come into existence before the time of distribution, see 2 Jarm. Wills, 78.]

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Class entitled, where distribution is postponed to a certain age.

316. The remaining rule of construction respecting gifts to children is, that, where the possession or distribution is postponed until the attainment of a particular age, the gift will include the children living at the death of the testator, and those who come into existence before the *eldest* reaches the prescribed age(*a*).

As, where a testator bequeaths a sum of money to be divided among such of the children of A. as shall attain the age of twenty-one years, the gift will embrace as well children living at the testator's decease, as those who come in esse before the majority of the eldest: *Congreve* v. *Congreve*, 1 B. C. C. 530; *Gilmore* v. *Severn*, Id. 582; *Barrington* v. *Tristram*, 6 Ves. 348; *Paul* v. *Compton*, 8 Ves. 380; *Gilbert* v. *Boorman*, 11 Ves. 23; *Curtis* v. *Curtis*, 6 Madd. 14; *Titcomb* v. *Butler*, 3 Sim. 417; *Balm* v. *Balm*, Id. 492. And the rule is the same where the bequest is to *all* the children: *Whitbread* v. *Lord St. John*, 10 Ves. 152; [*Matthews* v. *Paul*, 3 Swanst. 339; *Curtis* v. *Curtis*, 6 Madd. 14; *Blease* v. *Burgh*, 2 Beav. 221; *Gardner* v. *James*, 6 Beav. 170; *Boughton* v. *James*, 8 Jur. 329, 1 Coll. 26.] Pari ratione, if the distribution is to take place at the majority of the *youngest* child, then children born up to that period will be let in: *Hughes* v. *Hughes*(*b*), 3 B. C. C. 352. In these respective cases, if the eldest or youngest child (as the case may be) in the testator's lifetime reached the age which was made the period of distribution, the gift, being in event immediate at his decease, would receive the same construction as if it had been so framed, i. e. would be confined to children existing at the death of the testator.

The rule which lets in children born down to the period when some one object is entitled to call for distribution, shews the anxiety of the Courts, in construing gifts to children, to widen the range of objects as much as can be done, without postponing the enjoyment of

(*a*) Quære, whether this rule applies to general and independent legacies to children, vide *Ringrose* v. *Bramham*, 2 Cox, 384, noticed post, p. 328.

(*b*) [In this case the gift was to all the children of the testator's daughters A., B., and C., to be divided when the youngest of his said grandchildren should attain twenty-one; and it was declared by the decree, as stated by Mr. Eden, which corrects the seeming inaccuracy of the case, that the residue should be divisible among the grandchildren of the testator living at his death, and who had been since born, and who should be born, *until the youngest of such grandchildren should attain the age of twenty-one.* (See 2 Jarm. Wills, 82). If the youngest of such grandchildren had died under age, the period of distribution would have been accelerated. (See *Smith* v. *Jackson*, 1 Law J., Ch., 231).]

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any of the legatees beyond the prescribed age, which would be the necessary consequence of waiting, after the attainment of such age by any child, to see if any others come into existence. And a construction narrowing the class will not be adopted on light, though plausible grounds, such as that of the trustees having a power of advancing the shares before the period of distribution: *Titcomb* v. *Butler*, 3 Sim. 417.

Construction not varied by gift over.

But where an immediate gift to children is followed by a gift over to the survivors, in the event of any of them dying under twenty-one, though this would necessarily postpone the distribution of the original share of each legatee until his or her majority (which, indeed, the incapacity of minority would do), yet the gift is confined to children living at the testator's decease; *Davidson* v. *Dallas*, 14 Ves. 576; and, consistently with the principle of this determination, it has been held, that a direction to trustees, accompanying an immediate devise to children, to accumulate the rents for their benefit until they attain the age of twenty-one, does not entitle children born pending the trust: *Scott* v. *Harwood*, 5 Madd. 332. [See also *Robley* v. *Reding*, 11 Jur. 813; *Drew* v. *Killick*, 11 Jur. 900; *Elliott* v. *Elliott*, 12 Sim. 276.]

[In the case of *Berkeley* v. *Swinburne*, 12 Jur. 571, where a testator gave his residuary estate to trustees, in trust for his mother for life, after her decease in trust for all the younger children of his two sisters, to be vested interests at twenty-one, the shares of those dying under twenty-one to go to the others; and he directed the trustees to pay the interest of the presumptive share of any child, during minority, to its mother for its maintenance; it was held by Sir C. Pepys, M. R., and Sir J. Bernard Bosanquet, Lords Commissioners of the Great Seal, that the fund went to the children living at the death of the tenant for life, those dying under twenty-one having defeasible interests, and those born after the death of the tenant for life being excluded. In the course of his judgment, Sir C. Pepys said: "Now there are two other cases which are in terms precisely the same, in which we have the authority of Lord Eldon upon one, and the present Vice-Chancellor upon the other, and which, admitting the accuracy of the books in reporting those cases, will guide the Court in the present case. The first case is *Davidson* v. *Dallas*, 14 Ves. 576: there the gift was to the children of the testator's brother; there was no tenancy for life; and there being no tenancy for life, it came within the ordinary rules. In that case the testator by his will bequeathed to the children of his brother, 3000*l.*, to be equally divided amongst them, and if either of them should die before the age of twenty-one,

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then to go to the survivor,—exactly the same as here: if the parties should die before the age of twenty-one. There is a gift of one period by the will of the testator; no time is pointed out: there is a present legacy; but if the legatees died, they were not to receive their proportions until they attained the age of twenty-one. The decree in that case declared that all the children were entitled; that all the children of the testator's brother who were living at the death of the testator were entitled. Why, if that decree had stopped there, there would have been an argument in favour of the lady who had the greatest number of children; it would have been an erroneous and bad decree. That cause came on upon an appeal; and Lord Eldon, upon that appeal, decided that only those children who were living at the death of the testator were entitled to the fund, to be equally divided amongst them, with a limitation over, if either of them should die before the age of twenty-one, to the survivors; and therefore, according to the ordinary rules, that was the period of division. Then there is the case of *Severn* v. *Williams*, 5 Sim. 176: there there was a gift for life to the mother, and after her decease, to the grandchildren of the testator's brother, to be by them received when they attained the age of twenty-five. That comes much nearer to this case; there was a provision that it should be received upon the death of the tenant for life. Now, the Vice-Chancellor comes to this construction: that there was a gift to the children, and that the children were not to enjoy the property until they attained the age of twenty-one. Now, therefore, the argument, so far as it is applicable for the present case, agrees with that case; but he held that the gift was to the children only who were living at the death of the widow. That case and *Davidson* v. *Dallas* both decided the same principle: there is a provision for the enjoyment of the son, and a condition not to postpone the vesting, but there is a provision introduced which would have the effect of taking away that which was previously given. We are both (i. e. the Master of the Rolls and Sir J. Bernard Bosanquet) clearly of opinion that in this will there is a gift upon the expiration of the tenancy for life."]¹

Words narrowing or enlarging class.

4th. The preceding rules fixing the class of objects in reference to the period of their birth, only apply when the gift is indefinite; for the construction involved in them of course yields to, and is liable to be controlled by, words pointing out a wider or narrower range of objects.

"Now living."

Thus, the words "now living," added to a gift to children, take it completely out of the rules in question; the time referred to is held

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to be the period of making the will; precluding the claim, therefore, of children born in the interval between that period and the death of the testator (*a*): *James* v. *Richardson*, 1 Vent. 334, 2 Vent. 311; *S. C.*, nom. *Burchet* v. *Durdant*, T. Raym. 330. See *Attorney-General* v. *Bury*, 1 Eq. Ca. Ab. 201; *Crosley* v. *Clare*, 3 Swanst. 320, n.; *Abney* v. *Miller*, 2 Atk. 593; *Blundell* v. *Dunn*, cit. 1 Madd. 433; and not only so, but the objects are regarded not as a fluctuating class, embracing such of the children existing at the date of the will as happen to be living at the testator's decease (as one should have inferred, judging from the construction applied to indefinite gifts to children); but the gift is construed as applying to the children living at the making of the will, *as individuals*, in the same manner as if they were described by name; from whence ensues this consequence, that, if any of them die in the lifetime of the testator, being tenants in common, their shares lapse. See *Ackerman* v. *Burrows*, 3 Ves. & Bea. 54; see also ante, p. 208. [But if the class is to be ascertained by an event contingent at the date of the will (as where the gift is to all the children of B. who shall be living at A.'s death), the happening of that event before the testator's death does not so ascertain the individual members of the class as to make their shares subject to lapse by death before the testator: *Lee* v. *Pain*, 4 Hare, 250, ante.]

Words "born" or "begotten."

The word, *born* or *begotten*, however, added to a gift to children, does not restrict it to objects born before the making of the will, (Co. Litt. 20. b.), or before the death of the testator; *Brown* v. *Groombridge*, 4 Madd. 495; nor does a gift to children *hereafter to be born* apply exclusively to after-born children, but includes such as are born before the making of the will: *Doe* v. *Hallett*, 1 Mau. & Selw. 124. See also *Hewet* v. *Ireland*, 1 P. W. 426. [See Mr. Jarman's observations on the cases of *Hebblethwaite* v. *Cartwright*, Cas. temp. Talb. 31, and *Shuldham* v. *Smith*, 6 Dow, 22, in his Treatise on Wills, Vol. II, p. 101, notes (*m*), (*n*).]

"*To be* born," or "*to be* begotten."

The effect of the words "*to be* born or begotten," in letting in after-born children, admits of the following distinction:—If the gift is *immediate*, so that, without these additional words, it would be confined to children living at the testator's death, they operate to enlarge the gift, so as to comprehend all after-born children, without any regard to the circumstance of there being, or not being, a child living at the death. But where the words in question are annexed to a gift

(*a*) The same reasoning might apply to verbs in the present tense. But, as to a bequest to A.'s children to every child he *hath*, vide *Ringrose* v. *Bramham*, 2 Cox, 384, post, p. 328.

in remainder, or any other future gift, which would, under the ordinary rule, embrace children born after the testator's decease, they do not in general enlarge or vary the range of objects.

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Thus, if a testator give a fund to the children of A. *hereafter to be born*, the bequest will not be confined to the children, if any, living at the testator's decease (as would have been the construction without these words), but will extend to *all* after-born children: *Mogg* v. *Mogg*, 1 Mer. 654: while, on the other hand, if the gift be to A. for life, and, after his decease, to his grandchildren *hereafter to be born;* this will extend to grandchildren coming into existence before the period of distribution, but no farther, being precisely the same construction which would have obtained if the words in question had not been added: *Whitbread* v. *Lord St. John*, 10 Ves. 152; *Gilbert* v. *Boorman*, 11 Ves. 238. And a power of selection by will, given to a legatee for life in favour of grandchildren "hereafter to be born," has been held not to authorise an appointment to grandchildren born after the death of the donee of the power: *Paul* v. *Compton*, 8 Ves. 375.

Legacy to children born and hereafter to be born at twenty-one.

But it should seem, that there would be no such exclusion of children born after the period of distribution or payment, where the subject of gift is, not an entire fund to be distributed among the children, but a separate independent legacy to each; for, where a testator gave to all the children of A., whether now born, *or hereafter to be born*, the sum of 2000*l.* each, payable at twenty-one, Sir W. Grant, M. R., held that the children, whenever born, were included, though the testator had directed the executors, *soon after his death*, to set apart a sufficient sum for paying the legacies; his Honor conceiving such direction to be insufficient to control the preceding express terms of the gift, which this construction rendered impracticable: *Defflis* v. *Goldschmidt*, 1 Mer. 417. [See 2 Jarm. Wills, 99; *Sprackling* v. *Ranier*, 1 Dick. 344; *Storrs* v. *Benbow*, 2 Myl. & K. 46; and Sweet's Concise Precedents of Conveyancing, Appendix, p. 411, 2nd ed., and the cases there cited.]

Whether preceding rules apply to pecuniary legacies.

Perhaps these cases may suggest a doubt how far the preceding rules, fixing the classes of children entitled under indefinite gifts, and which were applied generally, if not invariably, to bequests of an *entire fund*, or property, among children, are applicable to pecuniary legacies to them respectively, and payable, not out of any divided or appropriated fund, but out of the general personal estate. In the latter case, the letting in unborn children is not attended with the consequence of postponing the payment of the legacies of the elder children, (unless there was doubt of the adequacy of the estate to

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provide for all), but with the still more inconvenient effect of tying up the entire personalty, which cannot be distributed until the number of the pecuniary legatees is ascertained; and this inconvenience appeared so considerable to Lord Alvanley, in the case of *Ringrose* v. *Bramham*, 2 Cox, 384, that he made it one (though it was only one) of the grounds for refusing to admit children born in the interval between the death of the testator and the majority of the eldest, under a bequest—"to A.'s children, 50*l.* to every child he *hath* by his wife E., to be paid to them by my executors *as they shall come of age.*" Whether this case will be considered as an authority for confining to children living at the death of the testator pecuniary legacies to children payable at majority, or as referable to the particular penning of the will, seems doubtful.

Child en ventre sa mere regarded as a child in esse, and even born.

5th. In applying the rules which regulate the claims of children by the period of their birth, a child en ventre sa mere is to be considered as a child in existence; and nothing but a clearly marked intention would induce a contrary construction. Thus, not only will a devise or bequest to the children of A. *living* at a given period include a child of this description; *Doe* v. *Clark*, 2 H. Bl. 379; but even a gift to children *born* at a prescribed period, has been recently held to extend to a child then in esse, though not actually born: *Trower* v. *Butts*, 1 Sim. & Stu. 181. See also 1 Bos. & Pull. 243. The express mention of posthumous children, therefore, has been properly omitted out of the modern forms. [See 2 Jarm. Wills, 103—105, and the cases there cited.]

Rules fixing the class of objects apply to grandchildren, brothers, &c.

6th. Gifts to grandchildren, great grandchildren, and remoter degrees of issue, are governed by the same rules of construction, in regard to the period of ascertaining the objects, as gifts to children. (See 2 Vern. 545). And gifts to brothers and sisters, nephews and nieces, &c., are also undistinguishable, being, in fact, substantially gifts to children described by another degree of relationship; for instance, a gift to nephews and nieces is, in effect, a gift to the children of brothers and sisters. Thus, it is clear, that if land or money is given to A. for life, and after his decease to his brothers or sisters, the gift will include the brothers or sisters living at the testator's decease, and those that come in esse during the life of A.: *Devisme* v. *Mello*, 1 B. C. C. 537; *Leake* v. *Robinson*, 2 Mer. 363; *Balm* v. *Balm*, 3 Sim. 492. So, if an immediate devise or bequest is made to brothers or sisters, it will apply to brothers and sisters living at the testator's death, without regard to the antecedent history of the class: *Doe* v.

Sheffield, 13 East, 526. Nor is this construction opposed by the case of *Ackerman* v. *Burrows*, 3 Ves. & Bea. 54, where the will consisted of a letter written by the deceased to his mother and sisters, expressing his wish that his property should be divided amongst them (the words were "I could wish it to be divided amongst you"); and the mother and one of the sisters having died in the testator's lifetime, Sir W. Grant, M. R., held that their respective shares lapsed; for it is evident that his Honor's conclusion was founded, not on any general rule of construction applicable to gifts to brothers and sisters as distinguished from children, but on the language of the will, which was considered to point at the individuals whom the writer addressed, and not to a fluctuating class, the effect being the same as if he had said, "I give to my sisters, A., B., &c." [As to servants, see *Parker* v. *Marchant*, 1 You. & Coll. C. C. 290; 7 Jur. 457.]

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[As to substitutionary gifts, see 2 Jarm. Wills, 105 et seq., 659 et seq.; Sweet's Concise Precedents in Conveyancing, Appendix, p. 415 et seq. See also the recent case of *Edwards* v. *Salsoway*, 12 Jur. 487, 493; and ante, p. 92.]

Substitutionary gifts.

[And as to the question whether a gift over in case of a prior devisee or legatee dying without children, means without *having had* or without *leaving* a child, see 2 Jarm. Wills, 112 et seq.]

Whether dying without children means *having* or *leaving* a child.

4. *Gifts to younger Children, first Son, eldest Son, &c.*

GIFTS TO YOUNGER CHILDREN.

Gifts to *younger* children are commonly intended as a provision for the unprovided-for branches of a family, as the *eldest* son, by the law of primogeniture and the ordinary mode of family settlements, usually takes the estate; and this consideration has so materially influenced the construction, that the term "younger children" has been held, in many instances, to mean children without distinction of age, other than those who take the estate. Thus, if a testator, having power to devise lands to any of his children, charged with portions for the younger children, appoints the lands to one or more of the children, the other children, *though senior to the appointees* of the land, would be entitled to share in the portion: *Duke* v. *Doidge*, 2 Ves. sen. 203. See also *Chadwick* v. *Doleman*, 2 Vern. 528; *Beale* v. *Beale*, 1 P. W. 244; *Butler* v. *Duncombe*, Id. 451; *Heneage* v. *Hunloke*, 2 Atk. 456; *Pierson* v. *Garnett*, 2 B. C. C. 38; *Hall* v. *Luckup*, 4 Simons, 5 (*a*). And, upon the same principle, a gift to younger children is

Younger, means unprovided-for children.

(*a*) It is clear, that a gift of portions to children in general, cannot be restrained to younger children, because charged on an estate which is devised to the eldest son: *Incledon* v. *Northcote*, 3 Atk. 438.

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confined to children of an existing marriage, since otherwise it might let in the eldest son of a future marriage, taking, by settlement or otherwise, a large estate: *Coleman* v. *Seymour*, 1 Ves. sen. 209.

Where gift is by parent or person standing in loco parentis.

But the construction in question, it seems, is confined to gifts by parents, or a grandfather, (1 Ves. sen. 209), or other person standing in loco parentis, and does not extend to gifts by strangers, who are considered to use the term "younger children" in its general or popular sense: see *Lord Teynham* v. *Webb*, 2 Ves. sen. 197; *Hall* v. *Hewer*, Amb. 203; *Lady Lincoln* v. *Pelham*, 10 Ves. 166. Nor is there any reported instance of its being applied to dispositions of real estate, unless where aided by the context. See *Heneage* v. *Hunloke*, 2 Atk. 456. [And see 2 Jarm. Wills, 117; *Wilbraham* v. *Scansbrick*, 1 H. L. C. 176.]

Whether, in all other respects, gifts to *younger* children are governed by the rules which apply to gifts to children in general, is doubtful. A gift to younger children, taking effect in possession at the decease of the testator, certainly has been held, in conformity to the general rule, to include the persons *then* answering to the description, and those only: *Coleman* v. *Seymour*, 1 Ves. sen. 209.

At what period the description of younger children must apply.

And it might seem to follow, that a gift to A. for life, and after his decease to his younger children, would apply to those who answered the description at the testator's decease, and who afterwards came into being. See *Lady Lincoln* v. *Pelham*, 19 Ves. 166. But this construction, however well recommended by the principles of analogical reasoning, has not invariably been adopted; for, in many instances, gifts to younger children, preceded by the gift of a life interest to the parent, have been held not to apply to a younger child, who becomes an elder during the life of the legatee for life: *Hall* v. *Hewer*, Amb. 203; *Ellison* v. *Airey*, 1 Ves. sen. 111. [See Mr. Jarman's observations on these cases, 2 Jarm. Wills, 121.] Of course, an express exception of the son who shall be the eldest at the time of the death of the tenant for life, restrains the gift to the younger children *at that period*: *Billingsley* v. *Wills*, 3 Atk. 219. And a gift to the elder son for the time being in one part of the will, would, it seems, form a ground for giving a similar construction to a gift to younger children indefinitely in another part. See *Bowles* v. *Bowles*, 10 Ves. 177; *Sansbury* v. *Read*, 12 Ves. 175.

It is clear, that, if there be an express gift over in the event of a younger child becoming an elder before a given age or period, such a child, becoming an elder *after* the prescribed age or period, is not excluded, agreeably to the rule exclusio unius est inclusio alterius: *Windham* v. *Graham*, 1 Russ. 331. Some of Lord Gifford's reason-

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ing in this case favours the conclusion that the time of vesting is the period of ascertaining who are younger children; and which seems to be the sound rule, though scarcely reconcilable with the case of *Matthews* v. *Paul*, 3 Swanst. 328, where Sir T. Plumer held, that the exception of "an eldest son" applied to the time of distribution, and not to the period of vesting. The circumstances, however, were not such as to render it necessary to decide on the alternative of these two constructions. [See Mr. Jarman's observations upon *Matthews* v. *Paul*, 2 Jarm. Wills, 123.]

Gift to *second* son.

Gifts to *first* and *second*, *eldest* and *youngest* children, frequently raise a question with respect not only to what is meant by these words, but also to the period when they are to be applied. In *Trafford* v. *Ashton*, 2 Vern. 660, under a devise in trust for A. for life, remainder to the *second* son of her body in tail, "second" was held to mean second in order of *birth*, and to apply to a second son who had become an elder at the testator's decease. In *Lomax* v. *Holmden*, 1 Ves. sen. 290, Lord Hardwicke considered, that, under a devise to A. for life, remainder to his *first* son in tail, *first* was to be construed as *eldest*, so as to extend to a son who was the second in order of birth, but the eldest at the testator's decease.

"First son."

"Second son."

In *Driver* v. *Frank*, 3 Mau. & Selw. 25, a testatrix devised to A. for life, remainder to the *second*, third, and every other son of A. by his then wife (except the first or eldest) successively in tail. Mr. Justice Dampier and Lord C. J. Gibbs thought that the estate vested in the second born son, whether the elder were living or not; and Mr. Justice Bayley thought that it vested in the second existing son as soon as A. had two sons together in esse; which did not happen until after the death of the testator: but the point did not arise, as the question was, whether, the three elder sons having died without issue, the fourth son, who, at the decease of A, had become the only surviving son (and who had co-existed with an elder son), could take. The majority of the Judges decided iu the affirmative.

"Youngest child."

A gift to the "younger child" has been held to extend to an only child: *Emery* v. *England*, 3 Ves. 232; see *West* v. *Lord Primate of Ireland*, 2 Cox, 258. See some points, noticed at the end of Sect. XVI., as to gifts to the children of several persons.

[As to the effect of a gift to the elder son for the time being, see the case of *Adams* v. *Bush*, 8 Scott, 405, and Mr. Jarman's observations thereon, 2 Jarm. Wills, 126.]

RULE IN WILD'S CASE.

Children, &c., where words of limitation.

[5. *Rule in Wild's case—"Children" &c., where Words of Limitation.*]

[In *Wild's case*, 6 Rep. 16 b, and in other early cases, it is laid down, that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail; for it was said, (6 Rep. 17), "the intent of the devisor is manifest and certain, that the children or issues should take, and as immediate devisees they cannot take, because they are not in rerum naturâ, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation." The principle has been followed in several subsequent cases. (See 2 Jarm. Wills, 308—310). But, in *Buffar* v. *Bradford*, 2 Atk. 220, where a testator in a certain event gave real and personal estate to *A. and the children of her body;* and A. having died in the testator's lifetime, leaving a child, who was born after the making of the will, *at which time A. had no child*, it was contended, on the authority of *Wild's case*, that the devise had lapsed; but Lord Hardwicke held the child to be entitled. His Lordship said, "it must be allowed that children, in their natural import, are words of purchase and not of limitation, unless it is to comply with the intention of a testator, where the devise cannot take effect in any other way. The plaintiff, being born in the lifetime of the testator, would have taken with his mother as joint tenant, if she had lived; as she is dead, he shall take the whole by way of remainder."]

[According to the resolution in *Wild's case*, as reported in Coke (6 Rep. 17), it has been considered as settled, that children, if there were any, would take jointly with their parent by purchase; and with this seems to agree *Oates* v. *Jackson*, 2 Stra. 1172. But, in the case of *Jeffery* v. *Honywood*, 4 Madd. 398, (and see Mr. Jarman's observations thereon, 2 Jarm. Wills, 313), where the devise was to A. and "to all and every the child and children, whether male or female, of her body lawfully issuing; and unto his, her, and their heirs or assigns for ever, as tenants in common," Sir John Leach, V. C., held, that A. took an estate for life, with remainder to her children as tenants in common in fee. He said, "I consider that there are two gifts, one to the mother, without words of limitation superadded; and another to her children, their heirs and assigns. And these two gifts can only be rendered sensible by construing, as the words import, a life estate to the mother, and a remainder in fee to the children. In *Oates* v. *Jackson*, the mother was, by the plain force of the expres-

sion, comprehended in the limitation in fee." And, in *Heron* v. *Stokes*, 2 Dru. & War. 107, Lord Chancellor Sugden, after citing the decision in *Jeffery* v. *Honywood*, said, "and certainly, the more natural construction of a gift to one and his children, there being no children in esse at the time, and that which I should have adopted, in the absence of authority the other way, would be to hold it a gift to the parent for life, with remainder to the children. What is there to prevent the children taking in this manner? It seems to me much better not to apply the rule in *Wild's case*." "These remarks," says Mr. Jarman, Treatise on Wills, Vol. II, p. 308, n. (*e*), "do not shew that this eminent Judge considered that the authorities would have left him free to adopt such a construction, if the point had called for decision. He would, doubtless, have felt himself bound to follow, in regard to real estate, the often recognised rule in *Wild's case*, either with or without the modification suggested. With respect to personalty, the authorities would not be found to present so formidable an obstacle to the adoption of the doctrine of the Irish Chancellor." But, see the observations of Lord Brougham in the same case, on appeal before the House of Lords, 12 Cl. & Fin. 180 et seq. And see as to whether the rule is applicable to bequests of personalty, 2 Jarm. Wills, 316, 317.] RULE IN WILD'S CASE.

[6. *Rule in Shelley's Case*].

[The rule of law (*a*), called *The rule in Shelley's case* (1 Co. 88 b), is, that where an estate of freehold is given to a person, and, by the RULE IN SHELLEY'S CASE.

(*a*) [Mr. Hayes has very ably shewn the pernicious consequences of treating this as a rule of construction. The general rules and principles of construction having been applied to the words, and having ascertained the co-existence of a freehold in the ancestor with a remainder to the heirs, the rule in *Shelley's case* then steps in; and in defiance of the most positive and unequivocal declaration that the ancestor shall take only a life estate, and that the heirs shall take as purchasers, attributes to the remainder the effect of a gift to the ancestor himself: Hayes's Principles, pp. xxxiii, 94, 98; and Introduction to Conveyancing, Vol. I, p. 545. Mr. Hayes observes, "the simplest and surest method of applying the rule is, to read the second limitation as a limitation to *the ancestor himself and* his heirs. This gives at once, and in every possible case, the true result:" 1 Hayes's Conv. 545. "This rule applies whenever judicial exposition determines that *heirs* are described, though informally, under a term correctly descriptive of other objects; but stands excluded, whenever it determines that other objects are described, though informally, under the term *heirs*. Thus, even the word *children*, aided by the context, or the word *issue*, uncontrolled by the context, (*Cursham* v. *Newland*, 2 Bing. N. C. 58, 4 Mees. & W. 101; *Lees* v. *Mosley*, 1 You. & C. 606; *Tate* v. *Clark*, 1 Beav. 100), may have all the force of the word *heirs*, and there the rule applies; while the word *heirs*, restrained by the context, may have only the force

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same instrument, an ulterior estate (whether immediately following the first or subject to other remainders intervening) is given to the heirs or the heirs of the body of the same person, the ulterior estate vests in that person himself, in the same manner as if it had been expressly given to him and his heirs, or to him and the heirs of his body. That is, if the gift be to his heirs, he takes a fee-simple; if to the heirs of his body, he takes a fee-tail. This rule of law is of great antiquity, as appears from the cases cited in the report of *Shelley's case.* Of these cases Mr. Preston says, in his View of the Rule in Shelley's Case, (p. 52), "Of all the cases [which are all from the Year Books of the reign of Edward the Third] particularised in the report, the case of the *Provost of Beverley*, (40 Ed. 3, fo. 9 a, b), alone is intelligible." In this case, by a fine sur grant et rendre, lands were settled upon John Sutton, the granting party in the fine, for his life, remainder to John his son, and to Eline his wife, and the heirs of their bodies begotten; and for default of such issue, remainder to the right heirs of John the father. John the father was dead, and John the son and Eline his wife were also dead without issue. Richard, another son of John the father, entered, claiming as a *purchaser* under the gift to the right heirs of his father. The effect of this gift came in question, upon a distress for a relief, a replevin, and *conuzance* by the bailiff of the provost of Beverley, setting forth the limitations, and justifying upon the ground that a relief was payable. The plaintiff in replevin concluded to the Court, demanding their judgment, if the avowry for the relief could be supported. The arguments on the part of the plaintiff, and some cases cited in support of them, were directed to shew that the limitation to the *heirs* gave the estate to Richard by *purchase.* The counsel for the avowant argued, that Richard became entitled by *descent* from his father. In answer to Finchden, of counsel with the plaintiff in replevin, Thorpe observed, "You have objected to pay a relief, because you are in as a purchaser, in regard that you are the first person in whom the remainder could take effect by the words of the remainder, but you are in as heir to your father, and your father had the *freehold preceding*, and if John his son and Eline his wife had died [without issue] in his lifetime, he would have been tenant in fee-simple, and for this estate might have brought a writ of right, and the remainder was not at all limited to you by your *proper name*, but as *heir*." For

of the word *children*, and then the rule is utterly irrelevant. These are preliminary questions, purely of CONSTRUCTION, to be considered without any reference to the rule, and to be solved by, exclusively, the ordinary process of interpretation." Ib. 543.]

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which reason it was awarded by all the Justices, that a return should be made, consequently that Richard took by descent, and a relief was payable. This case (though apparently not itself a case of tenure in capite) probably furnishes the *reason* (as to which there has been so much discussion (*a*)) of this rule, viz. an inclination on the part of the Judges in those and the preceding times to increase that source of the king's revenue which arose from the payment of the reliefs due on each devolution of an estate held in capite from the ancestor to the heir.]

Perrin v. *Blake*.

[The celebrated case of *Perrin* v. *Blake*, 4 Burr. 2579, 1 W. Bl. 672, furnishes a striking instance of the violent operation of this rule in defeating the manifest intention. In that case, W. W. devised in the following words:—"Should my wife be enseint with child at any time hereafter, and it be a female, I give and bequeath unto her the sum of 2000*l.* &c., and if it be a male, I give and bequeath my estate real and personal equally to be divided between the said infant and my son J. W., when the said infant shall attain the age of twenty-one. Item, it is my intent and meaning, that none of my children should sell or dispose of my estate for longer time than his life; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son J. W. and the said infant for and during the term of their natural lives, the remainder to my brother-in-law J. G. and his heirs, for and during the lives of my son J. W. and the said infant, the remainder to the heirs of the body of my said sons J. W. and the said infant, lawfully begotten or to be begotten, the remainder to my daughters, &c." No other son was born; and the question was, what estate J. W. took under this will. Lord Mansfield, Mr. Justice Aston, and Mr. Justice Willes, (Mr. Justice Yates dissentiente), held, that he was tenant for life only; but their judgment was reversed by a majority of the Judges in the Exchequer Chamber, who held, that J. W. took an estate tail. An appeal was brought in the House of Lords, but was compromised.]

[In order to let in the application of the rule in *Shelley's case*, the

(*a*) [Mr. Hayes has collected the various reasons assigned for the origin of this rule in his "Principles for Expounding Dispositions of Real Estate to Ancestor and Heirs in tail, Parent and Issue, &c.," a work of rare learning and ability; but, in stating his having come to the conclusion that the reason of the rule was that here stated, he makes a curious remark in regard to *relief*, which this *Provost of Beverley's case* is sufficient to shew the inaccuracy of; observing that "where the heir came in by succession or descent, and was under age, the lord of the fee was entitled to those grand fruits of military tenure, wardship, and marriage; but if the heir took by purchase, then only the trifling acknowledgment for a relief was due to the lord:" p. 56.]

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limitations to the ancestor, and to his heirs, must be created by the same instrument: *Moore* v. *Parker*, Lord Raym. 37, Skinn. 558. But for this purpose a will and a schedule to it are considered as one instrument: *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698. And Mr. Jarman observes, that the same principle undoubtedly applies to a will and codicil, or several codicils: 2 Jarm. Wills, 244.]

[Indeed, the above incident of the application of the rule, as well as some others, may be seen to flow as necessary consequences of the conditions on which the rule is founded, a freehold in the ancestor and a remainder in the heirs. For the definition of a remainder ("a remnant of an estate in lands, &c., expectant on a particular estate, created together with the same at one time," Co. Litt. 143. a.) plainly excludes the application of the rule to — 1st, the case of limitations created by different instruments; 2nd, the case of limitations differing in quality, one being legal and the other equitable; and 3rd, the case of an *executory* limitation, by way of devise or use. See 1 Hayes's Conveyancing, 542, 5th ed. As to the application of the rule to executory trusts, see 2 Jarm. Wills, 252 et seq.]

GENERAL AND PARTICULAR INTENTION.

[7. *What will control the Words "Heirs of the Body;" general and particular Intention.*]

[As to what will control the words "heirs of the body," and as to the doctrine of general and particular intention, see the important case of *Jesson* v. *Wright*, 2 Bligh, 1; and see Jarman's Treatise on Wills, c. 37, and Hayes's Principles, pp. 25, 44, 104, 105, 106, and Conveyancing, Vol. I, p. 547. As the case of *Jesson* v. *Wright* is considered to have overturned a long series of cases (which will be found stated in Mr. Jarman's Treat. on Wills, Vol. II, pp. 286 et seq.), it will be convenient to give here Lord Redesdale's statement of the principle of the decision. In this case, a testator devised to W. certain real estate for the term of his natural life, he keeping all the buildings in tenantable repair; and after W.'s decease he devised the same to *the heirs of the body of W.* lawfully issuing, in such shares and proportions as W. should by deed or will appoint, and for want of such appointment, then to *the heirs of the body of the said W. lawfully issuing, share and share alike, as tenants in common,* and if but one *child*, the whole to such only *child;* and for *want of such* issue, then over. It was held by the Court of King's Bench that W. took an estate for life only, with remainder to his children for life, as tenants in common. A writ of error was brought in the House of Lords, which Court reversed the decision below, and held,

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that an estate tail vested in W. by this devise. At the conclusion of the reply, Lord Eldon, C., said: "I cannot admit that all the cases cited have been well decided: but it was hardly to be expected that Judges should agree in the decision of all these cases; for the mind is overpowered by their multitude, and the subtlety of the distinctions between them. These difficulties make it the more necessary that we should deliberate before we determine this case." On the 15th of June, Lord Eldon observed: "It is definitely settled, as a rule of law, that where there is a particular and a general or paramount intent, the latter shall prevail, and Courts are bound to give effect to the paramount intent (*a*). The decision of the Court below has proceeded upon the notion, that no such paramount intent was to be found in the will." His Lordship then read the devise, observing, that, if he stopped at the end of the first devise to W., it was clear that he was to take for life only; if at the end of the first following words, 'lawfully issuing,' he would, notwithstanding the express estate for life, be tenant in tail: "and in order to cut down this estate," continued his Lordship, "it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed.' The words 'heirs of the body' will indeed yield to a particular intent, that the estate shall be only for life; and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator, but that must be clearly intelligible and unequivocal. The will then proceeds, 'in such shares and proportions as he the said W. shall by deed, &c., appoint.' 'Heirs of the body' mean one person at any given time, but they comprehend all the posterity of the donee in succession. W., therefore, could not strictly and technically appoint to heirs of the bod - This is the power, and then come the words of limitation over default of execution of the power—'and for want of such gift, &c. then to the heirs of the body, &c., share and share alike, as tenants in common.' It has been powerfully argued (and no case was ever better argued at this bar), that the appointment could not be to all the heirs of the body in succession for ever, and, therefore, that it must mean a person, or class of persons, to take by

[(*a*) Mr. Jarman (2 Treat. on Wills, 280, n. (*c*)) says: "By 'general intent' his Lordship must be understood to mean an intent to include heirs of the body in the gift. It is submitted, that those parts of the judgment in which Lord Eldon refers to the uncontrolled force of the words *heirs of the body*, contain a more satisfactory explanation of the principle than these passages. Lord Redesdale, it will be seen, strenuously insists upon this being the true ground of the decision."]

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purchase; that the descendants in all time to come could not be tenants in common; that 'heirs of the body,' in this part of the will, must mean the same class of persons as the 'heirs of the body,' among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are, therefore, to conclude that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side; as, for instance, how the children should take in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The defendants in error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words 'heirs of the body' mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted, that it must be children, because, in the concluding clause of the limitation in default of appointment, the whole estate is given to one *child*, if there should be only one. Their construction is, that the testator gives the estate to W. for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body; but, because children are included in the words 'heirs of the body,' it does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects. Then the words, '*for want of* such *issue*,' which follow, it is said, mean for want of children; because the word 'such' is referential, and the word 'child' occurs in the limitation immediately preceding. On the other hand, it is argued, that heirs of the body being the general description of those who are to take, and the words 'share and share alike as tenants in common,' being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation 'if but one child, then to such only child,' being, as they say, the description of an individual who would be comprehended in the terms heirs of the body; for 'want of such issue,' they conclude, must mean for want of heirs of the body. If the words 'children and child' are so to be considered as merely within the meaning of the words '*heirs of the body*,' which words comprehend them and other objects of the testator's bounty, (and I do not see what right I

have to restrict the meaning of the word 'issue'), there is an end of the question. I do not go through the cases."

[Lord Redesdale said: "There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is, therefore, necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult for a professional adviser to say what is the estate of a person claiming under a will. It cannot at this day be argued, that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, the first words are to be cancelled or overthrown. In *Colson* v. *Colson*, it is clear that the testator did not mean to give an estate tail to the parent. If he meant anything by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression or necessary implication. In this case, it is argued that the testator did not mean to use the words 'heirs of the body' in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe* v. *Goff* decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. *That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise.* In many cases,—in all, I believe, except *Doe* v. *Goff*,—it has been held that the words '*tenants in common*' do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common, but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected. Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties; but look to the words used in the will. The words, 'for want of *such* issue,' are far from being sufficient to overrule the

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words 'heirs of the body.' They have almost constantly been construed to mean an indefinite failure of issue, and, of themselves, have frequently been held to give an estate tail. In this case the words, 'such issue,' cannot be construed children, except by referring to the words 'heirs of the body,' and in referring to those words they show another intent. The defendants in error interpret 'heirs of the body' to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words 'heirs of the body' to mean children in this will."]

["It cannot be doubted," observes Mr. Hayes (Introduction to Conveyancing, Vol. I, p. 551), "that the increasing embarrassment arising from the indiscriminate resort 'to general and particular intention,' which, from meaning originally nothing, had come to mean almost anything or everything, contributed mainly to bring the doctrine into discredit. It has at length been solemnly pronounced vague and erroneous by the Court of King's Bench in the recent case of *Doe* d. *Gallini* v. *Gallini*, 2 Nev. & M. 632; 5 Barn. & Ad. 621; affirmed in error in the Exchequer Chamber, 3 Ad. & Ell. 340. Lord Denman, C. J., in delivering the judgment of the Court, animadverts upon the doctrine in these terms: 'The doctrine, that the general intention must overrule the particular intention, has been much, and we conceive justly, objected to of late, it being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. (See Powell on Devises, 3rd ed., Vol. II, c. 27, p. 552). In its origin it was *merely descriptive of the operation of the rule in Shelley's case*, and it has since been laid down in others, where technical words of limitation have been used, and other words, shewing the intention of the testator, that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but, in the latter cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale, in *Jesson* v. *Wright*. This doctrine of general and particular intent ought to be carried no further than this; *and thus explained, it should be applied to this and all other wills.* Another undoubted rule of construction is, that every part of that which the testator meant by the words he has used, should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject.'"]

XV. Gifts to illegitimate children.

GIFTS TO ILLEGITIMATE CHILDREN.

Children born out of wedlock may take under any description which they have acquired by reputation, and which adequately designates them, collectively or individually, as objects of gift: *Metham* v. *Duke of Devon*, 1 P. W. 529. The word "children," however, or any other term descriptive of issue, of whatever class, imports legitimate issue, and those only; and, in order to extend it to persons of illegitimate birth, it must be shewn that, by necessary or irresistible implication, such was the intention of the testator. And the circumstance, that no legitimate issue have in event existed to advance their superior claim, is immaterial, since it would be conclusive against the illegitimate children that their claim *might* have come into competition with, and have been excluded by, those of legitimate issue. Hence it follows, that illegitimate children can never be let in under a gift to the children simply of a living person; for, since such a gift, by the established construction (vide ante, p. 318), would include children born in the interval between the making of the will and the death of the testator, the fact of the non-existence of any other than illegitimate children at the former period raises no necessary inference that the testator did not contemplate such a change of circumstances as would supply the gift with legitimate objects. Thus, if a testator, being a bachelor, and having illegitimate children, whom he has always recognised and treated as his own, makes a gift in favour of his children generally, however plausible may be the conjecture that he intended the illegitimate children, yet it is only conjecture; and, consequently, the general rule prevails: *Godfrey* v. *Davis*, 6 Ves. 43; *Harris* v. *Lloyd*, 1 Turn. & Russ. 310.

Children, primâ facie, means legitimate children.

So, where a testator gives to his children by an unmarried woman with whom he is then living, or has previously lived, still it would be presumed that he contemplated marrying her: *Kenebel* v. *Scrafton*, 2 East, 530; *Arnold* v. *Preston*, 18 Ves. 288. And if the testator were married at the time, the rule would be the same, as he might contemplate surviving his wife and then marrying the woman in question. But if the contents of the will indicate that the testator expected his wife to survive him, (and a legacy to her of course would be such an indication), this is considered to negative his supposed contemplation of marriage with the mother of the children, and lets in illegitimate children: *Wilkinson* v. *Adam*, 1 Ves. & Bea. 425 (*a*).

(*a*) [The following are Mr. Jarman's statement of this important case of *Wilkinson* v. *Adam* and the rule he deduces from it:—"A testator, being married, but having children by a woman named Ann Lewis, devised to his wife for life

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The dissolution of the marriage, by a divorce, even in such a case, offers a scheme reconciling the testator's expectation of his wife's sur-

a certain mansion-house, and, after her decease, to Ann Lewis, (who then lived with him), for life, provided she continued single and unmarried; and, subject thereto, he devised the whole of his estate, (after limiting a term of years thereout), *in trust for the children which he might have by the said Ann Lewis*, share and share alike, and to his, her, and their heirs for ever; and, in default of such child or children, over. He also bequeathed to Ann Lewis an annuity for the care, management, and guardianship of each of the children. By a codicil, (but which, being unattested, was inoperative to affect the construction of the devise), the testator declared that his meaning was to include three children of the said Ann Lewis, (naming them). The question was, whether the illegitimate children of the testator by Ann Lewis, living at the time of the making of the will, could take under the devise in the will. It was contended, on the authority of the preceding cases, that the testator must be considered to contemplate the events of his wife dying and his marrying Ann Lewis, and having legitimate children by her; that the intention was clear, that after-born children should take, and it would be extremely difficult on the words to hold the devise good as to those already born, and not as to those afterwards born. But Lord Eldon, assisted by Thompson, B., and Le Blanc, J., and Gibbs, J., held, that the three children were entitled, by the effect of the whole will. The Judges grounded their opinion on the manner in which the testator described the children themselves, and Ann Lewis, their mother, as living with him whilst his wife was then alive, the mode in which he appointed her guardian of such children, the limiting her annuity, and her compensation for the guardianship, to the time of her continuing single and unmarried, with many other passages in the will; and they laid particular stress on the devise of the mansion to the testator's wife for life, and, after her decease, to Ann Lewis for her life, and then to the children; for, supposing these devises to take place in the order in which they stood, *the wife of the testator must have survived him, and his children by Ann Lewis must consequently have been illegitimate.* Lord Eldon concurred generally with the Judges as to the illegitimate children being intended; and, with regard to the objection that they could not take as a class, though they might by a description amounting to designatio personarum, his Lordship considered that as decided by *Metham* v. *Duke of Devon*, 1 P. Wms. 529, whatever might have been his opinion if it were res integra. In concluding an elaborate judgment, his Lordship expressed his opinion, that it was impossible that the testator, a married man, with a wife, who, he thought, would survive him, providing for another woman to take after the death of his wife, and for children by that woman, could mean anything but illegitimate children. They took, therefore, by necessary implication, on the face of the will."]

["Lord Eldon's doctrine, that the intention to give to illegitimate children (as distinguished from legitimate children) must appear on the face of the will, is not to be understood as precluding all inquiry into the state of the testator's family. Thus, in the case of a devise to "my children now living," *Blundell* v. *Dunn*, cit. 1 Madd. 433, or "to the children of A.," a *deceased person*, *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419, it is not known, by a mere perusal of the will, whether legitimate or illegitimate children were intended; and yet when it is ascertained that there were no other than the latter objects in existence, the conclusion, that he meant illegitimate children, is irresistible."]

["The characteristic of these cases is, that, according to the events existing *at the making of the will*, legitimate children never could have claimed un-

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vivorship of himself with the possibility of his marrying the woman in question. But, in *Wilkinson* v. *Adam*, this was either overlooked, or (which is more probable, remembering by whom it was decided (*a*)), was considered as too much out of the ordinary course of transactions to be presumed to have entered into the testator's calculation.

Necessary implication in favour of illegitimate children.

But if, according to events existing *at the time of the making of the will*, the testator must necessarily have meant illegitimate children, (as, where the gift is to the children of a person who has previously died, leaving no other than illegitimate children, which fact appears to have been known to the testator), such children may take under the bequest: *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419. And the same principle would apply equally to a gift to the children even of a living person, the terms of which exclude after-born children, as to children "now living:" *Blundell* v. *Dunn*, cit. 1 Madd. 433.

Gifts to pre-existing children.

It must not be supposed, however, that a different rule obtains in regard to gifts to pre-existing children, from that which applies to children in general; for it has been repeatedly decided, that, under a gift to the children of a deceased person, the existence of legitimate children is fatal to the claim of illegitimate children: *Fraser* v. *Pigott*, 1 Younge's Eq. Exch. Rep. 354; see also *Swaine* v. *Kinnerley*, 1 Ves. & Bea. 469; *Hart* v. *Durand*, 3 Anst. 684. Indeed, the two last of the cited cases carried the rule so far as to make the existence of a *single* legitimate child a ground for excluding illegitimate children, *though the gift was to children in the plural;* but to this extent they have not been followed. Thus, in the case of *Gill* v. *Shelley*, at the Rolls, 28th January, 1831 (*b*), where the testatrix gave

der the bequest, and, therefore, could not have been in the testator's contemplation. The rule (expressed in accommodation to the cases in question) may be stated thus: *in order to let in illegitimate children under a gift to children, it must be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken.* This, it is submitted, is the spirit and meaning of Lord Eldon's position in *Wilkinson* v. *Adam*, and forms a test by which the claim of illegitimate children is always to be tried. Unfortunately, however, this principle has not been invariably adhered to; and even the anxious effort of Lord Eldon, to place the doctrine on a firm and intelligible basis, has not had the effect of securing uniformity of decision on this important subject." 2 Jarm. Wills, 137—140.]

[Though legitimate and illegitimate children cannot take under the same description, they may take under a designatio personarum; as where a testator, having four children, two of each kind, gives to his four children *then living*. See 2 Jarm. Wills, 147.]

(*a*) The Editor has been informed that the point was adverted to, though it is not noticed in the Report.

(*b*) For a report of this case the pro-

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her real and personal estate to her husband, J. M., for his life, and directed that, after his death, such residue should be divided amongst certain classes of persons mentioned in her will, adding, "amongst whom I include the children of the *late* Mary Gladman." Mary Gladman was then dead, having left two children, one legitimate, and the other (being born before her marriage) illegitimate. Sir J. Leach, M. R., said, that if *Swaine* v. *Kennerley*, and *Hart* v. *Durand*, had not been distinguishable from the case before him, he should have felt no hesitation in overruling them; and decreed that the illegitimate child was entitled to share in the residue.

The only obvious distinction between these cases and *Gill* v. *Shelley* is, that in them the bequest was to *child* and children; but which, it is conceived, makes no real difference; since the testator evidently uses the singular number, not with a view to the *then* existing state of the class, but in contemplation of the possible event of its being reduced to a single object in the interval between the making of the will and the death of the testator. It is apprehended, therefore, that the cases of *Swaine* v. *Kennerley* and *Hart* v. *Durand* (which always appeared to the Editor to carry the exclusion of illegitimate children a step too far) may be considered as overruled.

Illegitimate children may take by name.

Of course, a gift to the children even of a living person, described as consisting of a definite number, will include illegitimate children if they are required to complete the numerical description: 1 Ves. & Bea. 467. Such a gift, indeed, seems to be undistinguishable in principle from a gift to illegitimate children *by names* which they have acquired by reputation, which is notoriously good; *Rivers's case*, 1 Atk. 410; see also *Mortimer* v. *West*, 3 Russ. 370; and the designation of them as *legitimate* children will not affect their claim, being merely an inaccurate superfluous addition to the preceding terms of description: *Standen* v. *Standen*, 2 Ves. jun. 589; [*Meredith* v. *Farr*, 2 You. & C. C. C. 525. So, a gift to the *children* of A. in a will where illegitimate children of A. were named for the purpose of another bequest, was held to include the illegitimate children where A. had only one legitimate child. But, in the same will, a gift to the children of B. was held not to include illegitimate children, B. having several legitimate children: *Meredith* v. *Farr*, 3 You. & C. C. C. 525.]

fession is indebted to Mr. Wigram, who has added it to his printed statement of, and observations on, *Goblet* v. *Beechy*, noticed ante, p. 273. [The case of *Gill* v. *Shelley* is stated in Sir J. Wigram's Work on the Application of Extrinsic Evidence to the Interpretation of Wills, p. 44, 3rd ed., and is now reported 2 Russ. & M. 336.]

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The following cases well exemplify the rejection of conjectural grounds for including illegitimate progeny in gifts to children.

Mere conjecture does not entitle illegitimate children.

A testator, having three legitimate and one illegitimate child, gave his property to all and every the child and children whom he might happen to leave at his death, and shewed, by expressions in the direction concerning maintenance, that he contemplated a division of the property into fourths: Lord Rosslyn held that the illegitimate child was not entitled to share with the legitimate children; *Cartwright* v. *Vawdry*, 5 Ves. 530; and Lord Eldon has expressed his cordial acquiescence in the decision. See 1 Ves. & Bea. 464.

So, where a testator made bequests in favour of his four illegitimate children, (describing them by name, and as having been baptized as the children of himself and A. B.), *together with every other child of the body of the said A. B. living at his decease, or born and living within nine calendar months afterwards;* it was held, that illegitimate children, born after the making of the will, were not entitled, there being nothing "to shew by necessary implication that the testator intended that illegitimate children should take:" *Mortimer* v. *West*, 3 Russ. 370. Applying to this case the test before suggested, we shall find, that, if the testator, or any one else, had married A. B., the children of such marriage would have taken under the bequest in question, and, consequently, it was properly held that illegitimate children could not (*a*).

Again, where a testator gave the residue of his property equally between the children of his son W. and of two other children, it was held, that an illegitimate child of W. was not entitled to share in the residue, though the testator, in the same will, had made a specific bequest to her, by the description of the only surviving child of his son W.: *Bagley* v. *Mollard*, 1 Russ. & Myl. 581. And, à for-

(*a*) [It may be noted here that a gift to *future* illegitimate children is void, whether they are described with reference to both the parents or only to the mother, but for different reasons in those cases respectively. Where the gift is to the children of a certain man by a certain woman, as in the cases of *Metham* v. *Duke of Devon*, 1 P. Wms. 529, and *Wilkinson* v. *Adam*, 1 V. & B. 422; and see the statement of *Metham* v. *Duke of Devon* in the written opinion of the Judges in *Wilkinson* v. *Adam*, 1 V. & B. 458,—all who have acquired the *reputation* of being such children before the will was made, may take, but no others; and the inquiry must be, not who were in point of fact such children, but who had acquired the reputation of being so, and such reputation could not be acquired before birth. But where the gift is to future children of a certain woman, though the question of identity might not be the bar as in the former case, yet, as the woman might have legitimate children, the gift would be held to apply to them to the exclusion of all future illegitimate children. Vide infra, p. 347.]

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tiori, will such a child not be let in by the testator's recognition of him or her in documents dehors the will: *Wilkinson* v. *Adam*, 1 Ves. & Bea. 422. See also *Arnold* v. *Preston*, 18 Ves. 288.

Deviations from the strict rule of exclusion.

In some instances, however, feelings of compassion towards the innocent victims of the law's stern but salutary policy, have induced a tacit relaxation of the strict rule of construction exemplified in the class of cases just stated. As where a testator, resident in India, bequeathed in the words following: "To my children the sum of pounds sterling 5000. To the mother of my children the sum of sicca rupees 6000:" *Beachcroft* v. *Beachcroft*, 1 Madd. 430. Indeed, in one instance, an able Judge is made to treat it as a general rule of construction, that illegitimate children may take under a gift to children: see *Bayley* v. *Snelham*, 1 Sim. & Stu. 78; and (what is even yet more strange) to cite as an authority for this position the case of *Wilkinson* v. *Adam*, 1 Ves. & Bea. 422, which stands upon grounds extremely special, as every one conversant with Lord Eldon's elaborate judgment in that case well knows. But the decree in *Bayley* v. *Snelham* did not require to be supported by such doctrine, the language of the will powerfully aiding the claims of the illegitimate children; and hence there would be ground to suspect (were the Reporters ordinarily less faithful), that the Vice-Chancellor's observations were misunderstood.

Rule as to reference to the male parents.

It is no objection to a gift to existing illegitimate children, that they are described as the children of both their reputed mother and father, since the reputation would be conclusive in regard as well to the male as to the female parent; but a gift to the *future* illegitimate children of a man is admitted on all hands to be bad. It is even doubtful whether a gift to a child with which an unmarried woman is pregnant, described as the child of a particular man, is valid: *Earl* v. *Wilson*, 17 Ves. 528; but see *Evans* v. *Massey*, 8 Price, 22.

Child en ventre sa mere.

Its validity depends on the question being, whether a testator can fairly be considered as meaning to incur the risk of the child not having been procreated by the person whom he describes as the father, (whether himself or another), or intends to make the fact an essential ingredient in the qualification. The latter hypothesis would be fatal to the gift. However, if the infant en ventre sa mere is described as the child of the woman only, without reference to the father, the gift is, in every point of view, unimpeachable, (*Gordon* v. *Gordon*, 1 Mer. 141; *Dawson* v. *Dawson*, 6 Madd. 292), because it is sufficiently certain, and has no immoral tendency: not so, where the gift would embrace the unprocreated illegitimate children of a woman; which, though free from objection on the ground of uncer-

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tainty, might seem to be obnoxious to the principle of the reasoning which has been applied to, and has been held to vacate, bonds given to a kept mistress, in consideration of future cohabitation. (As to which, vide ante, Vol. 3, p. 384). It would be idle to deny that a prospective provision for illegitimate offspring tends to promote the illicit connection from which they arise; and, perhaps, when the ground of the acknowledged invalidity of a gift to the future illegitimate children of a *man* is examined, it will be found to possess little force beyond what is derivable from this consideration; for, if the objects of a gift to the existing illegitimate children of a man are ascertainable by reputation, why may it not be equally resorted to in fixing the objects of a gift to his future offspring? It is true, that reputation cannot take place until after birth; but it seems to be wholly unimportant, so far as concerns the ultimate ascertainment of the objects of the gift, whether the name and filial character are thus acquired before or after the making of the will. It is true, also, that subsequently born children cannot have been known to the testator; but his recognition of them is not essential to the claims of illegitimate children, except as it may happen to constitute part of their evidence of reputation, which it necessarily does where the gift is to the testator's own offspring. It should seem, then, that something more is meant by the old writers, who have denounced the gifts in question as illegal, (vide ante, p. 49), than to raise the objection of uncertainty; they must be considered as taking the higher ground which has been suggested; and hence would flow this important practical result,—that gifts to the future illegitimate progeny of a woman, no less than of a man, are invalid. If, on the other hand, the whole gist of the objection to the future gifts in question lies in their uncertainty, it cannot apply indiscriminately to *all* gifts to the unborn illegitimate children of a man, but must be confined to such as make the fact of the filial relation to the *male* parent (which cannot, properly, be the subject of inquiry) a part of the qualification; for, if it is clearly evinced that *reputation* alone is to entitle them, it seems impossible to view such gifts as standing in a less favourable plight than gifts to the future illegitimate children of a woman.

Whether gift to future illegitimate children is valid.

It should be observed, however, that a gift to the future illegitimate children, restricted to such as are born in the testator's lifetime, might possibly be maintained, consistently with the invalidating principle contended for in the preceding observations; because, as the gift does not extend to objects born after the will takes effect, at no point of time can it be said to offer encouragement to incontinency. Hence, a gift so expressed affords the best chance of sustaining a

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prospective provision for objects of this nature, though, in the absence of decision, it would be unwise in practice to rely on its efficiency.

Suggestion as to providing for illegitimate children.

The only certainly effectual mode of providing for illegitimate children, who are not in esse when the will is made, is, by the execution of a codicil after the birth of each, which should clearly express the disposing intention in favour of the child, leaving nothing to implication; for it has been decided that the fact of a testator, by a codicil, recognising as his own an illegitimate child, born since the execution of the will, does not entitle him or her to come in under a bequest in the will to children generally: *Arnold* v. *Preston*, 18 Ves. 288.

Another point worthy of attention is, that, in giving real or personal property to illegitimate children, a vested interest should never be left in them, in the event of their dying without issue, until they have reached an age which enables them to dispose of it; since (as bastards can have no heirs or next of kin other than those which issue from themselves) the effect would be to let in the title of the Crown. This title extends to the entire real and personal estate, with a few exceptions. The dower and distributive share of any widow the deceased may have left are, of course, to be excepted; also copyholds, which belong to the lord of the manor, *Walker* v. *Denne*, 2 Ves. jun. 170, whose claim, however, arising propter defectum tenentis, of course does not extend to equitable interests; on which principle, where A. by his will devised copyholds to B. and his heirs, upon condition that within one month he paid to the executors 2000*l.*, which the testator directed should be taken as part of his personal estate, and A. then disposed of this sum of 2000*l.* to charities, and afterwards died without heir or next of kin—Sir J. Leach, V. C., held, that the void legacy of 2000*l.* belonged to the Crown: *Henchman* v. *Attorney-General*, 2 Sim. & Stu. 498 (*a*). In the great case of *Burgess* v. *Wheate*, 1 Eden, 177, it was held, that where lands were limited to A. and B. in fee, in trust for C. in fee, and C. died without heirs, the Crown was not entitled to call for a conveyance from A. and B.; who, therefore, it should seem, (though this it was

(*a*) The exclusion of the title of the devisee of the land, in this case, is important, as bearing on a point discussed in a previous section, (ante, p. 212), and treated as presenting much difficulty, from the apparent equiponderance of the several conflicting authorities; of which, it is remarkable, that *Arnold* v. *Chapman*, 1 Ves. sen. 108, alone, was cited to or noticed by the Vice-Chancellor. Agreeing, however, as it does with the principle of another decision of the same learned Judge, (*Jones* v. *Mitchell*, 1 Sim. & Stu. 290), the case may be considered as no unimportant accession to the authorities in favour of the heir.

not necessary to determine), would be enabled to retain the property discharged from the trust. The doctrine of this case, which was decided by Lord Keeper Henley and Sir T. Clarke, M. R., in opposition to the opinion of Lord Mansfield, has attracted much attention, and has had many learned champions and opponents. Vide 2 Ves. sen. 300, 1 B. C. C. 200, 3 Ves. 424, 3 Ves. 752; vide further as to the failure of heirs, ante, Vol. 4, p. 187. [As to the general conclusions on the subject of gifts to illegitimate children, see 2 Jarm. Wills, 155.]

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XVI. GIFTS TO NEXT OF KIN—RELATIONS—LEGAL REPRESENTATIVES—PERSONAL REPRESENTATIVE—EXECUTORS OR ADMINISTRATORS—FAMILY OR HOUSE—HEIR.

GIFTS TO NEXT OF KIN.

"NEXT OF KIN."

"Next of kin," how construed.

Gifts to next of kin have raised the rather nice question, whether they are confined to the persons taken strictly as next of kin under the Statutes of Distribution, or extend to those whom the statutes admit to share in the personal estate as the representatives of next of kin. The latter construction was supported by the respectable names of Mr. Justice Buller (*Phillips* v. *Garth*, 3 B. C. C. 64), Sir Lloyd, afterwards Lord, Kenyon (*Stamp* v. *Cooke*, 1 Cox, 236), and Lord Loughborough (*Lowndes* v. *Stone*, 4 Ves. 649), and perhaps at one period might have been regarded as prevailing; but at present the weight of authority is in favour of the stricter, and it is conceived the sounder, construction, which rests on dicta and decisions by Lord Thurlow, (*Phillips* v. *Garth*, 3 B. C. C. 64), Lord Eldon, (*Garrick* v. *Lord Camden*, 14 Ves. 385), and Sir W. Grant, (*Smith* v. *Campbell*, 19 Ves. 404), [recognised and established by modern decisions of the highest authority. See the decision in *Brandon* v. *Brandon*, 3 Swanst. 312, by Sir T. Plumer, M. R., to the same effect. In the case of *Elmsley* v. *Young*, where a fund was settled by indenture, upon trust, after failure of certain previous trusts, for such persons as should, at the decease of A., be his *next of kin*, and A. died, leaving a brother and the children of a deceased brother; Sir J. Leach, M. R., held, that the children of the deceased brother were entitled to a moiety of the fund, on the ground that where the words "next of kin" are used simpliciter and without explanatory context, they are to be understood as next of kin according to the Statute of Distributions: 2 Myl. & K. 82. But the case

Elmsley v. *Young*.

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was then brought by appeal before Lords Commissioners Shadwell and Bosanquet, who, after a full examination of the conflicting authorities, held, that the trust applied to the next of kin in the strictest sense of the term, excluding persons entitled by representation under the statute, and, consequently, that A.'s surviving brother was entitled to the whole fund: 2 Myl. & K. 780. "This decision," observes Mr. Jarman (Treatise on Wills, Vol. II, p. 38), "concurring as it does with the opinions of three of the greatest equity Judges of recent times, may, it is hoped, be considered to have finally settled this long-agitated question."]

Withy v. *Mangles.*

[In the case of *Withy* v. *Mangles*, 4 Beav. 358, 5 Jur. 717, where the ultimate limitation of personal property under a marriage settlement was "upon trust for such person or persons as at the time of the death of E. M. should be her next of kin;" and E. M. died, leaving a child, and a father and mother; Lord Langdale, M. R., decided, that, under this limitation, the father, mother, and child, notwithstanding the preference given by the Statutes of Distribution to the child over the parents, were equally entitled and took as her next of kin in joint tenancy. Upon appeal to the House of Lords, this decision was affirmed: 8 Jur. 69, 10 Cl. & Finn. 215. Lord Cottenham, in delivering his opinion that the words "next of kin" must be construed in their natural and obvious meaning of nearest in proximity of blood, took a most luminous survey of the authorities upon the point. His Lordship observed: "The first consideration is, what is the rule of the law of England in extending the proximity of kindred? For such rule must govern, unless superseded by what constitutes the second consideration, which is, have the words used received a conventional or technical construction? for if they have, such must be considered as the sense in which they have been used. As to the first of these questions, there really is no doubt. All writers agree, that, in extending proximity of kindred, the law of England considers the ascending and descending lines as equal. Blackstone, in the passage quoted for another purpose by the appellant, says, 'Both (that is, the children and the parent) are in the first degree.' If, then, the law of England considers the child and the parent of a person deceased as equal in degree of proximity, nothing can prevent their taking equally under a limitation to 'next of kin;' but such words having received some construction and technical meaning different from and controlling this their obvious and natural meaning, the point to be established by the appellant is, that 'next of kin' has been construed to describe one nearest in proximity in the descending line, to the exclusion of all in the ascending line,

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though equal or nearer in degree of proximity. In support of this proposition, it was first urged, that, in the succession to property, the descending line is preferred to the ascending; but, unless this preference be founded upon the supposition that the party preferred is nearer of kin, it proves nothing. The passage in Blackstone before referred to, and relied upon by the appellant, shews that, in his opinion, proximity of kindred was not the ground of the preference. He says, both, indeed, are in the first degree; but with us the children are allowed the preference, that is, they are preferred in grants of administration, though not nearer of kin than the parents of the deceased; from which it follows, that the right of the child to preference in grants of administration has no bearing upon the construction to be put upon the words 'next of kin.' The statute of Hen. 8, c. 5, proves the same thing; for it gives to the ordinary the power of selecting, amongst persons in equal degree of kindred, to whom administration should be granted. How, then, can the granting of administration, in pursuance of this power, to the child, in preference to the parent of the deceased, prove that the child is considered as being nearer in degree of kindred? It is an established rule of the Ecclesiastical Court, that the right to the administration of the effects of an intestate follows the right of the property in them, *In Re Gill*, 1 Hagg. 342, to the exclusion even of next of kin, notwithstanding the express provisions of the statute of Hen. 8; as in the cases of *Bridges* v. *The Duke of Newcastle*, (cited in *West* v. *Willby*, 3 Phil. 381), and *Young* v. *Peirce*, 1 Freem. 496. How, then, can the right of the child who is entitled to the property of the deceased, to have administration granted to him in preference to the parent of the deceased, who is not so entitled, prove that the child is considered as nearest of kin? It was then argued, that the term 'next of kin' had, by usage, acquired a meaning in which it must be supposed to have been used in the settlement, and that such meaning was, 'those who, as next of kin, are entitled to the succession of the personalty.' The Statute of Distributions accurately preserves the distinction between next of kin and those to whom it directs the distribution of the personalty. If there be no children, it directs the distribution of the estates equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them, and then confines the representation within brothers' and sisters' children, not treating the rights of those who take by representation as belonging to them as next of kin, but as derived from others, who, if they had lived, would have been next of kin. If the familiar expression, 'next of kin under the statute,' be considered as having reference to this

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provision of the statute, it will not be found to be so inaccurate as has been supposed. The question, however, is not whether next of kin under the statute has not been inaccurately used in describing those who are entitled under the statute, but whether the term 'next of kin,' without any reference to the statute, has received any such judicial construction. A short examination of the cases will shew that the contrary is established by a very great preponderance of authority. The first referred to in support of the affirmative of this proposition is a dictum of Lord Kenyon, in *Stamp* v. *Cooke*, 1 Cox, 236, in which he is represented as saying, 'If the residue had been given to the next of kin, and the testator had stopped there, the statute would certainly have been the rule to go by.' This is merely a dictum, for the question had not arisen in the case, the gift being to testator's 'next relations, as sisters, nephews, and nieces;' which Lord Kenyon construed to mean, that the property should be parted amongst them in the same manner as the statute directs. In *Phillips* v. *Garth*, 3 Bro. C. C. 68, Buller, J., held, that a gift to 'next of kin, share and share alike,' was a gift to those whom the statute pointed out, but (which from the words was unavoidable) that they were all to take equally; a direction sufficient of itself to prove that the testator did not mean that the property should go according to the provisions of the act. In *Hinckley* v. *Maclarens*, 1 Myl. & K. 27, Sir John Leach decided, that a gift to next of kin operated in favour of a brother and the children of deceased sisters, to take per stirpes, or under the statute. This was certainly more correct in principle than that which was done by Buller, J., in *Phillips* v. *Garth;* but it was giving a meaning to words very foreign to their natural and obvious meaning, and without any ground for assuming that the testator had used them in this sense, or that they had by usage or decision obtained any such construction. If 'next of kin' mean those who would take under the statute, it would include in many cases those who are not next of kin; and a gift to a class, which, in all other cases gives an equal portion to each member of the class, must in this particular case adopt a different and altogether artificial rule of decision. This decision was followed by the same learned Judge in *Elmsley* v. *Young*, 2 My. & K. 82. Such are the authorities in support of the proposition, of which that of Lord Kenyon, being merely a dictum, was not capable of being reviewed; that of Buller, J., was not disapproved of by Lord Thurlow, Lord Eldon, Sir William Grant, Sir Thomas Plumer, and every other Judge except Sir John Leach; and that of Sir John Leach was expressly overruled on appeal in the case of *Elmsley* v. *Young*. Lord Thurlow, it is true,

did not overrule Buller, J.'s judgment in *Phillips* v. *Garth*, because the brother had not appealed; but he so strongly felt the unsoundness of that decision, that, when the case came before him upon another point, he ordered that the case should stand over, that the brother might present a petition of re-hearing: 3 Bro. C. C. 69. In *Garrick* v. *Lord Camden*, 14 Ves. 384, Lord Eldon expressed his concurrence in Lord Thurlow's opinion. Sir William Grant, in *Smith* v. *Campbell*, 19 Ves. 404, expressed a similar opinion, and, in the previous case of *Wimbles* v. *Pitcher*, 12 Ves. 433, held brothers entitled, to the exclusion of nephews, under the words 'next of kin in equal degree, share and share alike.' Sir T. Plumer, in *Worthington* v. *Statham*, 1 Mad. 36, and *Brandon* v. *Brandon*, 3 Swanst. 319, decided upon the words 'next of kin' in favour of brothers and sisters, to the exclusion of nephews and nieces. In *Elmsley* v. *Young*, 2 My. & K. 780, upon appeal from the Master of the Rolls, the present Vice-Chancellor, Sir L. Shadwell, and Bosanquet, J., sitting as Lords Commissioners, upon the above authorities, overruled the decision of Sir J. Leach. With the exception, therefore, of the opinion of Sir J. Leach, which was so overruled, there has been an uniform course of decisions and of opinions expressed for upwards of fifty years in opposition to the doctrine of Buller, J., in *Phillips* v. *Garth*; but these decisions and opinions are not only decisive as to the weight of authority, but they displace the only ground upon which the contrary doctrine could be supported. The appellant can only succeed by shewing, that the term 'next of kin' has, by a technical and conventional construction, obtained the meaning of 'those who would be entitled in case of intestacy under the Statute of Distributions.' That is a question of fact; and had it been so used, all the Judges whose opinions have been referred to as objecting to the doctrine of Buller, J., in *Phillips* v. *Garth*, since the year 1790, have been ignorant of the fact, and have held that the words had not obtained any such construction. I find no trace of any such construction having been adopted, except from Lord Kenyon, in *Stamp* v. *Cooke*, in 1786, and Buller, J., in *Phillips* v. *Garth*, in 1790, which was in the same year repudiated by Lord Thurlow. To give such a construction to the words, would be, under the words 'of kin,' to include persons not of kin at all, as husbands and wives; and under the word 'next,' to include persons comparatively remote with those nearest of kin. It is some satisfaction to be able to trace the origin of Buller, J.'s, opinion, because it tends to diminish the weight which would otherwise attach to any decision of his; and he says, 'I cannot distinguish this case

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(*Phillips* v. *Garth*) from that of *Thomas* v. *Hole*.' That case is in point, except that there the word is 'relations,' which, being to be construed next of kin, makes it this case. The principle of this case, and of the many others which have followed it, had no application to that of *Phillips* v. *Garth*. The term relations per se is too general; all mankind are in a sense related, and it is impossible to say in any case where relationship terminates. If, therefore, the Court had not put some restrictions upon the generality of the term, all such gifts must have failed; and that Lord King, in *Thomas* v. *Hole*, Cas. temp. Talb., 251, states to be the reason of his decision. To prevent this failure of the testator's intention, the Court considered the term 'relations' to mean such relations as would take under the Statute of Distributions. In doing this, though a qualification was added to the expression, no violence was done to it; for all who could take under the statute would be relations, except husbands and wives, and they were excluded; whereas, in the term 'next of kin,' there is no uncertainty, and no objection from its being too general; and the rule of the statute cannot be adopted without doing violence to the description—proximity not being exclusively the qualification under the statute. Not only is the distinction between relations or near relations and next of kin obvious, but in *Marsh* v. *Marsh*, 1 Bro. C. C. 293, which was before *Phillips* v. *Garth*, under a gift to nearest relations, a sister was held entitled, to the exclusion of nephews and nieces; and this was followed by Sir William Grant, in *Smith* v. *Campbell*. A testator may indeed so express himself as to intimate an intention, that the rule of the statute should prevail, as in *Stamp* v. *Cooke*. So in *Lowndes* v. *Stone*, 4 Ves. 649, a gift of the residue of estate and effects to next of kin or heir-at-law, was held to include nephews with an uncle, the words implying heirship according to the nature of the property; and in *Garrick* v. *Lord Camden*, 14 Ves. 385, Lord Eldon intimated an opinion, that the same construction would be put upon a gift of residue to be divided 'among my next of kin, as if I had died intestate;' which could only be effected by adopting the rule of the statute. But I think that the appellant has wholly failed in proving that the term 'next of kin,' used simpliciter, has, by a technical or conventional construction, obtained the meaning of 'those who would be entitled in case of intestacy under the Statute of Distributions.' I am, therefore, of opinion, that these words must be construed in their natural and obvious meaning of nearest in proximity of blood, and that this appeal ought to be dismissed with costs."]

"RELATIONS."

GIFTS TO RELATIONS.

"Relations," how construed.

Gifts to relations were at first attempted to be impugned on the ground of uncertainty, and such, indeed, must necessarily have been their fate, unless a line could have been drawn restrictive of their almost illimitable range of objects. This has been effected by confining the gift to the relations who would take the personal estate under the Statutes of Distribution; *Thomas* v. *Hole*, Cas. temp. Talb. 251; *Harding* v. *Glyn*, 1 Atk. 469; *Rayner* v. *Mowbray*, 3 B. C. C. 234; which construction is now applied as well to gifts of real, as to those of personal estate; *Doe* v. *Over*, 1 Taunt. 263; and is not varied where the term is "near" relations: *Whithorne* v. *Harris*, 2 Ves. sen. 527. See also 19 Ves. 403.

"Nearest relations."

But a gift to *nearest relations* is confined to the next of kin, properly so called, exclusively of persons whom the statutes admit jure representationis: *Pyot* v. *Pyot* (*a*), 1 Ves. sen. 335; *Marsh* v. *Marsh*, 1 B. C. C. 293; *Smith* v. *Campbell*, 19 Ves. 400; unless where the testator subjoins explanatory expressions, shewing that he used the term in a wider sense. Thus a gift to nearest relations, "as sisters, nephews, and nieces," has been held to let in all the objects of distribution under the statute: *Stamp* v. *Cooke*, 1 Cox, 234.

Admission of relations of half blood.

As relations by the half blood are within the statute, so they are clearly comprehended in gifts to next of kin and relations; and a legacy to the next of kin of A. "of her own blood and family, as if she had died sole, unmarried and intestate," has received the same construction: *Cotton* v. *Scarancke*, 1 Madd. 45. Of course, a gift to next of kin or relations simply, does not extend to relations by affinity; *Maitland* v. *Adair*, 3 Ves. 231; secus where the term is "relations by blood *or marriage*:" *Devisme* v. *Mellish*, 5 Ves. 529. A gift to next of kin or relations does not include the husband or wife; *Watt* v. *Watt*, 3 Ves. 244; *Anderson* v. *Dawson*, 15 Ves. 537; *Bailey* v. *Wright*, 18 Ves. 49; even though it be "among my next of kin, *as if I had died intestate*:" *Garrick* v. *Lord Camden*, 14 Ves. 372.

—by affinity.

Distribution per stirpes and per capita.

The Statutes of Distribution not only fix the objects of a gift to relations, but also regulate the manner of their taking; it being settled, that, under such a gift, the distribution among next of kin and representatives of next of kin is per stirpes, and not per capita;

(*a*) [In this case the expression was, "my nearest relation of the name of Pyot," and the word *relation* was held to apply to the stock, and not to a single individual. And Mr. Jarman thinks a gift to relations in the plural would apply to a single individual: 2 Treat. on Wills, 46.]

GIFTS TO RELATIONS.

Pope v. *Whitcombe*, 3 Mer. 689; see also *Stamp* v. *Cooke*, 1 Cox, 234; *Rowland* v. *Gorsuch*, 2 Cox, 187; *Lowndes* v. *Stone*, 4 Ves. 649; unless the testator has introduced into the gift expressions pointing at equality in the distribution, which are considered to require a distribution per capita, so that the children of deceased brothers and sisters take an equal portion with their uncles and aunts, and not their parents' shares merely; *Thomas* v. *Hole*, Cas. temp. Talb. 251; *Green* v. *Howard*, 1 B. C. C. 31; *Phillips* v. *Garth*, 3 Id. 64; *Rayner* v. *Mowbray*, Id. 234; *Butler* v. *Stratton*, Id. 369; see also *Elliott* v. *Davenport*, 1 P. W. 83; and even, without any such expressions, persons equal in degree take per capita as under the statute.

"Poor relations," how construed.

A bequest to the most deserving of the testator's relations, *Doyley* v. *Attorney-General*, 4 Vin. Ab. 485, pl. 16, 2 Eq. Ca. Ab. 194, (E), pl. 15, or, it seems, to the testator's *poor* relations, receives the same construction as a gift to relations simply; *Widmore* v. *Woodroffe*, Amb. 636; *Anon.* 1 P. W. 327 (*a*); though in earlier cases gifts to poor relations seem to have been extended to necessitous persons, being relations, beyond the statute: 2 Vern. 381, 1 Ves. sen. 231. In one instance, a gift to the "poorest" relations was treated as charity, to be administered within the limits of the statute; Amb. 595; as was more recently a bequest for the purpose of "putting out our poor relations apprentices:" *White* v. *White*, 7 Ves. 423. In a still later case, Sir J. Leach, M. R., held that a devise of real estate to trustees, in trust to pay the rents "to such of my poor relations as my trustees shall think most deserving," was a charitable trust, and as such void within the statute 9 Geo. 2, c. 36 (stated ante, p.140). *Hale* v. *Attorney-General*, Rolls, 28th July, 1829. See also *Brunsden* v. *Woolredge*, Amb. 507; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Attorney-General* v. *Price*, 17 Ves. 371.

Extent of power of appointing among relations.

It is to be observed, that a power of appointment created in favour of relations is not restricted to next of kin or their representatives, but the donee may appoint to more remote relations: *Harding* v. *Glyn*, 1 Atk. 469; *Mahon* v. *Savage*, 1 Sch. & Lef. 111; *Forbes* v.

(*a*) [In this case (*Anon.*, 1 P. Wms. 327) the testator devised the surplus of his personal estate to his *poor relations*; and the Countess of Winchelsea being a relation, as near as any to the testator, she was a party to the suit, and claimed a share; and it was decreed she was entitled thereto, in regard the word "poor" was frequently used as a term of endearment and compassion, rather than to signify an indigent person; as one says, my poor father, my poor child, &c. "But this," adds the reporter, "seems to have been a strained interpretation in favour of the Earl and Countess of W., who had not an estate any way proportionable to their quality.]

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Ball, 3 Mer. 437; *Grant* v. *Lynam*, 4 Russ. 292. But if, from his neglect to exercise the power, the execution of the trust devolves upon the Court of Chancery, the ordinary construction prevails, as the discretion involved in the power being personal to, expires at the decease of, the donee, and the Court merely executes the trust, which, either expressly or by implication, follows the power: *Cole* v. *Wade*, 16 Ves. 27.

Period of ascertaining the objects. [See 2 Jarm. Wills, 52 et seq.]

Having ascertained generally who are the objects of gifts to next of kin and relations, the next step is to inquire at what period the description is to be applied; and here attention may be directed to the great difference, in point of construction, between gifts to children and gifts to other classes; the former, admitting an accession of fresh objects in the interval between the period of vesting and of possession or distribution (vide ante, p. 318); while, in regard to the latter, when the period of vesting has arrived, the door is closed against future accessions. Thus, if a devise or bequest is made to A. for life, and after his decease to his children, this lets in the children living at the testator's decease, and those who come into existence during A.'s life; on the other hand, where the gift is to A. for life, and after his decease to the testator's relations, the latter gift takes effect in favour of relations living at his decease, to the exclusion of those who might happen to come in esse during the life of A.: *Doe* v. *Lawson*, 3 East, 278; *Cruwys* v. *Colman*, 9 Ves. 319; *Pope* v. *Whitcombe*, 3 Mer. 689; *Forbes* v. *Ball*, Id. 437.

Where relations at the time of distribution are meant.

In some instances, however, the term relations or next of kin, occurring in such a gift, has been held to apply to persons answering the description at the decease of the legatee for life, the period of distribution. It does so, according to Sir Edward Sugden, in all cases in which the gift is preceded by a power of selection or distribution in the legatee for life—a circumstance, certainly, not presenting any very obvious ground for departing from the ordinary construction. Indeed, the ordinary construction seems to be recommended by greater convenience, since it enables the donee, when exercising the power, to know precisely to whom it extends, which, of course, is impossible, if the objects are not ascertained until his decease. However, the case of *Harding* v. *Glyn*, 1 Atk. 469, recognised as it was by Sir W. Grant in the case of *Cruwys* v. *Colman*, 9 Ves. 324, probably would be considered to have established the rule propounded by the eminent author in question, as applied to powers of *selection;* but the case of *Pope* v. *Whitcombe*, 3 Mer. 689, which is also one of the cases cited by Sir E. Sugden, is a direct authority against his position, as applied to *powers of distribution*. The gift, in substance, was to A.

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for life, with a power to her to dispose of the residue among the testator's relations, in such manner as she should think fit; and the power not being exercised, it was held that the next of kin, *at the testator's decease*, were entitled. And this agrees with a previous decision at the Rolls, in the case of *Hands* v. *Hands* (*a*), 1 T. R. 437, n. The result of the authorities, therefore, would seem to be, that a gift to relations or next of kin, preceded by a gift for life, with a power of selection to the legatee for life, applies to relations or next of kin at *his* decease; and that a gift to relations or next of kin, preceded by a life interest and a power of distribution to the legatee for life, applies to relations or next of kin at *the testator's* decease.

But where the power even of selection is not preceded by a life interest, and is made immediately exercisable by an appointment taking effect inter vivos, the gift is necessarily confined to relations at the testator's decease (*b*): *Cole* v. *Wade*, 16 Ves. 27.

What circumstances postpone the period of ascertaining the objects.

The circumstance of the legatee for life being *one* of the next of kin at the testator's decease, has been decided not to form a ground for deferring to a future period the ascertainment of the objects of the gift, which therefore applies as ordinarily to next of kin at the testator's decease: *Holloway* v. *Holloway*, 5 Ves. 399. Secus, where the legatee for life is the *sole* next of kin, in which case the gift is held to embrace next of kin at the period of distribution, i. e. the decease of the legatee for life: *Jones* v. *Colbeck*, 8 Ves. 38. And where the gift to next of kin is to take effect in defeazance of a prior gift to a person, who, in the event of his surviving the testator, would be his sole next of kin, the term is construed to mean persons answering the description at a future period, and that period in general would be when the executory gift vests in possession: *Miller* v. *Eaton*, Geo. Coop. 272.

[In *Godkin* v. *Murphy*, 2 You. & Coll. 351, 7 Jur. 505, where a testator bequeathed the residue of his personal estate to his wife for life, and after her decease to his sister for life, and after the decease of his sister to such person or persons as under the Statute of Distributions should be legally entitled to the same, Vice-Chancellor Knight Bruce held that the testator meant either a joint tenancy or a tenancy in common among the next of kin who may be alive at the

(*a*) It is observable, that Lord Eldon, in *Wright* v. *Atkyns*, 19 Ves. 302, referred to this case as contradicting *Harding* v. *Glyn*—an intimation which cannot fail to put the reader on his guard against the too ready acquiesence in the scheme suggested in the text for reconciling them.

(*b*) Mr. Roper, 1 Treat. Leg. 102, has overlooked this distinction in his observations on the case.

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death of his sister. In *Jenkins* v. *Gower*, 2 Coll. 537, where a testator directed his trustees to pay the dividends of certain stock to his wife for life, and, after her decease, to transfer the capital to such persons and in such manner as might be expressed in any codicil or codicils to his will, and in default of such appointment by codicil (which he never made) to transfer the same to such person or persons as would under the Statutes of Distribution of Intestates' Estates have been entitled to his personal estate, Vice-Chancellor Knight Bruce held, that the fund belonged to those who at the testator's death, and not to those who at the widow's death, would have been entitled to his personal estate in case he had died intestate; consequently, that the widow was entitled to a distributive share of the fund. But his Honor observed: "The question of joint tenancy has been waived by the plaintiff, and therefore need not be decided. Not relying in the least upon the case of *Godkin* v. *Murphy*, it is not material to consider whether, in deciding that case, I took a correct view of the will then in question, or of the law applicable to it."]

Next of kin of a deceased person.

Where the gift is to the next of kin of a person who dies before the testator, the entire property (at least where there are no words severing the joint tenancy), vests in such of the objects as survive the testator: *Bridge* v. *Abbott*, 3 B. C. C. 224; *Vaux* v. *Henderson*, 1 Jac. & Walk. 388, n. If it be to the next of kin or relations of a living person, of course the description cannot be applied at the death of the testator, or at any other period, during the life of such person: *Cruwys* v. *Colman*, 9 Ves. 319. It must await his death, and will vest in those who first answer the description, whether the distribution takes place then or subsequently: *Danvers* v. *Earl of Clarendon*, 1 Vern. 35.

Next of kin who shall be living, &c.

But it is clear that the circumstance of the gift being restricted to objects existing at a future period, as to next of kin who shall be living at the end of ten years from the testator's decease, makes no further variation in the construction than that of engrafting into their qualification this additional ingredient; for it has been well observed, that the testator means some class of persons, of whom it is doubtful whether they will live to the future period or not. Hence, it is a gift to such of the next of kin at the testator's decease as shall be living at the future period: *Spink* v. *Lewis*, 3 B. C. C. 355.

GIFTS TO REPRESENTATIVES, EXECUTORS, AND ADMINISTRATORS.

"REPRESENTATIVES," "EXECUTORS," AND "ADMINISTRATORS."

"Legal representatives," how construed.

The term "legal representatives," used in relation to personal estate, properly designates the executors or administrators, who are, with respect to personalty, the representatives of the deceased testator or intestate, though, in a few instances, the term has been applied to

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next of kin. Thus, in the case of *Bridge* v. *Abbot*, 3 B. C. C. 224, where a testatrix bequeathed to certain persons, and, in case of the death of any of them before her, to his or her *legal representatives* the next of kin were held to be entitled. So, in *Long* v. *Blackall*, 3 Ves. 486, the same construction was given to a bequest in a certain event to the testator's own *legal representatives*. And again, in *Jennings* v. *Gallimore*, 3 Ves. 146, where the expression was somewhat varied, being "*legal representatives according to the course of administration*."

Legal representatives.

[In *Cotton* v. *Cotton*, 2 Beav. 67, the bequest was to A. or his "*legal representatives*." A. was dead at the date of the testator's will, having bequeathed his property on certain trusts. The several points argued were: first, whether the fund was subject to the trusts of A.'s will; secondly, whether his executors took beneficially as his "legal representatives;" and, thirdly, whether the fund was divisible among the nearest of kin of A. (thus excluding the widow), or among his next of kin, according to the Statute of Distributions. Lord Langdale, M. R., held that A.'s next of kin according to the Statute of Distributions were entitled to the fund. His Lordship observed: "It is undoubtedly a matter of extreme difficulty to determine what a testator really means in cases like the present; but a construction has been put upon these words to which I am bound to adhere. In *Bridge* v. *Abbot*, 3 Bro. C. C. 224, *Lacy* v. *Blackall*, 3 Ves. 486, and *Walter* v. *Makin*, 6 Sim. 148, it has been considered, that legal representatives mean those persons who are by law entitled to claim beneficially the undisposed of residue, and who are, in this sense, the persons legally representing the individual to whom the gift was first made. The question is, who are these persons; it has been contended, that they are either the executors or the next or nearest of kin; on the other hand, it is argued, that they are those persons who would be entitled beneficially under the Statute of Distributions; and I am of that opinion. When it is said that the expression "legal representatives" means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons who, upon the construction of the will, are beneficially entitled, in the place of the person to whom the gift was first made, and who, in that sense, legally represent such person. I must therefore refer to the Statute of Distributions, which points out those who are entitled to claim as the legal representatives in that particular sense of the words, and the authorities have determined that this fund belongs to those persons who are the next of kin, as designated by that statute."]

[In *Booth* v. *Vicars*, 8 Jur. 76, where the bequest was, after the

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death of the tenant for life, to A. and B. if then living, but if dead to the "respective next legal representatives of A. and B.," and A. and B. died before the tenant for life; Vice-Chancellor Knight Bruce, after quoting the above observations of Lord Langdale in *Cotton* v. *Cotton*, said, "I also am of opinion that the persons who, by force of law, by right of consanguinity, would take the personal estate beneficially, are the persons here intended by the testator. As to the next question, whether they are to take per stirpes or per capita, my opinion is, that they take per stirpes. The word "representatives" almost enforces that interpretation."]

Legal personal representatives.

[In the recent case of *Hinchcliffe* v. *Westwood*, 12 Jur. 618, where a testator gave the interest of 1000*l.* to his daughter for life, and after her death to her children; but if she died without leaving any issue, he gave the capital to his sons in equal shares, and in case of the decease of any of them in his daughter's lifetime he gave his or their share or shares to his or their *legal personal representative or representatives*. The daughter died without ever having been married, and two of the sons died in her lifetime: Vice-Chancellor Knight Bruce held that their executors were entitled and not their next of kin. His Honor observed: "It seems to me, the only plausible argument in favour of Mr. Metcalfe's construction for the next of kin is, that, upon Mr. Daniel's construction for the executors, the clause it wholly superfluous, because the gift would have had the same effect if the words had been wholly omitted. It does not appear that that argument is enough of itself to displace the plain and proper meaning of such words as 'legal personal representatives.' The words are too strong to be so got rid of. Here are both the word 'legal' and the word 'personal.' It requires prodigious force to surmount the words 'legal personal representative.'"]

"Executors or administrators," held to mean *next of kin*.

[In the case of *Palin* v. *Hills*, 1 Myl. & Kee. 470, where a testator, after bequeathing certain pecuniary legacies, declared that, in case of the death of any or either of the legatees, his or her legacy should go to *his or her executors or administrators*, Lord Brougham, C., reversing a decree of Sir J. Leach, M.R., decided in favour of the next of kin, on the authority of the case of *Bridge* v. *Abbot:* his Lordship thinking that a gift to executors or administrators was wholly undistinguishable from a gift to legal representatives. But see *Wallis* v. *Taylor*, 8 Sim. 241.]

In the case of a gift to A. *and his legal representatives*, the latter are obviously words of limitation merely, and will vest the absolute interest in A.: *Lugar* v. *Harman*, 1 Cox, 250. And where a legacy was given to be divided among children who should be living at a fu-

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ture period, and the *legal representative or representatives* of him, her, or them who should be then dead—Sir J. Leach, V. C., considered that the words were used in this sense, and operated as words of limitation, and that a vested interest was given to the children, at least, on their attaining twenty-three; at the same time observing, *that it was a sound rule of construction to understand words in their ordinary sense, unless controlled by a different intention appearing on the whole instrument: Price* v. *Strange*, 6 Madd. 159 (which compare with *Horsepool* v. *Watson*, 3 Ves. 383).

"Personal representatives," how construed.

In a subsequent case, where a testator bequeathed a sum of 1000*l.*, in trust to pay the interest to his daughter for her separate use, free from the control of any husband, and directed that after her decease the same should pass by any will or disposition she might under her hand and seal make thereof, and for want thereof *should go to her personal representatives;* the same learned Judge (then occupying another judicial chair) held, that, in default of appointment, the legacy devolved to the husband of the daughter, as her administrator and personal representative: *Sabberton* v. *Skeels*, 1 Russ. & M. 587.

Executors or administrators not entitled for their own benefit.

This construction agrees with the earlier case of *Evans* v. *Charles*, 1 Anstr. 128, where an administrator was held to be entitled under the description of "personal representative" of a person who was dead when the will was made, and *for his own benefit.* The latter branch of the decision has, however, been much disapproved of. (See *Price* v. *Strange*, 6 Madd. 161). It is not only inconsistent with the principle of Lord Eldon's reasoning in the well-known case of *Ripley* v. *Waterworth*, 7 Ves. 425, but it is at variance with and may be considered as overruled by the late case of *Collier* v. *Squire*, 3 Russ. 467, where, by a marriage settlement, a sum of stock was settled upon trust for the intended wife for life, and after her decease for the intended husband, his executors, administrators, or assigns, in case he should survive her; but, in case he should die before her, then to transfer the stock as the husband should by deed or will appoint, and in case he made no appointment, then *to his executors or administrators.* The husband died in the lifetime of the wife, having left a will, but made no appointment of the fund, which was held to belong to his executrix, *as part of his general personal estate.* See also *Wellman* v. *Bowring*, 1 Sim. & Stu. 24, 2 Russ. 374, 3 Sim. 328. These cases have also overruled *Churchill* v. *Dibben*, Sugd. Pow. 289, n., as well as *Sanders* v. *Franks*, 2 Madd. 147, unless the latter case can be considered as distinguishable. Leaseholds were bequeathed to A. for life, and after her decease to such persons as she should by will appoint, and in default to the executors or administrators of A., *to and for his,*

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her, or their own use and benefit; Sir T. Plumer, V. C., held an administator to be entitled for his own benefit by the force of these words. It is improbable that a bequest so expressed would now receive a similar construction, as the words in question seem too weak to warrant a departure from the ordinary rule, which, it must be remembered, was unsettled when this case was decided. [But see the case of *Wallis* v. *Taylor*, 8 Sim. 241, where a testatrix bequeathed a fund to trustees, for the separate use of her daughter for life, and after her decease, upon trust to transfer the principal to her executors or administrators, *to and for his, her, or their use and benefit absolutely for ever*, and Sir L. Shadwell, V. C., held that the husband of the daughter, on his taking out administration, was absolutely entitled for his own benefit. "In this case," observes Mr. Jarman, 2 Treat. on Wills, 45, "the point of contention was not so much whether the administrator was entitled in his own right beneficially, or in his representative character, (this being, in regard to a husband-administrator, a matter of no importance, unless there are creditors, as he retains the property for his own benefit); but whether, according to the case of *Palin* v. *Hills*, the bequest was not to be construed as applying to the next of kin. The testator's intimation, that the legatees should take for their own benefit, was not only consistent with, but perhaps was rather favourable to this construction, as tending to shew that the testator had in view persons who might reasonably be presumed to be intended as beneficial objects of gift."]

[In the recent case of *Andrew* v. *Andrew*, 1 Coll. 686, Vice-Chancellor Knight Bruce held that the executors were not entitled to a beneficial interest in the testator's residuary personal estate. His Honor observed: "The question, whether the executors are entitled beneficially to the residuary personal estate, is one of some nicety, and not unlikely to be viewed differently by different minds. The gift to them is in terms of all the personal estate, not of all the other personal estate, or of the personal estate not before disposed of. It is true, that, where the testator mentions the names of the executors, he describes two (for whom provisions are otherwise made by the will) as his natural sons, and the third as the son of his friend. It is true, also, that the commencement of the gift to them is similar to the commencement of other gifts in the will undoubtedly beneficial, and that there are clearly beneficial gifts in it subject to charges: nor is it unworthy of observation, that, upon the construction maintained by the next of kin, the whole gift to the executors is without operation, not effecting any purpose beyond that effected by the

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mere appointment to the executorship. It is, however, equally true, that, in the gift to the executors, they are designated by their office merely, not by their names; that the purpose of paying debts and mortgages may be thought to be expressed as if it were meant or expressed to exhaust the whole subject of the gift; and that the testator's intention as to an insurance (probably on the life of his brother Jonathan) appears to have been reserved or uncertain, and that he may be argued not to have intended it for the executors. These seem the principal remarks on each side to which the will is liable. Upon its whole language and the authorities, (those to which the executors' counsel referred, and some others), I have had to ask myself whether the gift to the executors was a gift only for a particular and limited purpose, or a general gift subject to a charge. Having found myself unable to say that this is a general gift subject to a charge, I have come to a conclusion in favour of the next of kin. The cases of *Pratt* v. *Sladden*, 14 Ves. 193; *Dawson* v. *Clark*, 15 Ves. 409; and *Southouse* v. *Bate*, 2 Ves. & B. 396, contain, as is well known, very valuable observations of Sir W. Grant and Lord Eldon upon cases of this kind. I have been reading them with attention, and desire to be understood as not giving any opinion how the title to the residue would have stood, in the present instance, had the statute mentioned at the bar, 1 Will. 4, c. 40, which did not exist when those cases were decided, not been passed: it forms part of the law under which the will before me takes effect."]

GIFTS TO FAMILY.

"Family," or "House," imports heir, when.

"FAMILY," AND "HOUSE."

The word "family" and "house" are of equivocal import, often varying their meaning according to the subject-matter. In *Chapman's case*, 3 Dyer, 333, it was held that the words "or else to remain to the house," in relation to real estate, signified family, "which should be intended the chief and most worthy and eldest person in the family," i. e. the heir. So, in *Counden* v. *Clerke*, Hob. 33, it is laid down, that, if land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house. The same construction prevailed in a more recent case, where a testator devised all his lands, as well freehold as leasehold and copyhold, unto his mother, C. A., and her heirs for ever, in the fullest confidence, that, after her decease, she would devise the property to his *family;* Sir W. Grant, M. R., was of opinion that the effect of this devise was to limit the property to the mother for life, with reversion to the testator's heir-at-law at his death; *Wright* v. *Atkyns*, 17 Ves. 255; and Lord Eldon, on appeal, confirmed his Honor's decision. (19 Ves. 143). The

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case being carried by appeal to the House of Lords, it was, however, there held that the mother took an estate in fee, the House not being called upon to pronounce who were the objects of the trust after her decease: *Wright* v. *Atkyns*, Turn. & Russ. 143. In this case, the gift purported to include leaseholds, but there were none; so that it was not necessary to discuss the construction of the word *family*, as applied to them, which, according to the authorities, possibly might have been different. Thus, in a case cited 1 Taunt. 266, it is said to have benn decided at the Rolls, in 1732, that, under a limitation to the *family* of J. S., the real estates descend to the heir-at-law, the personal estate goes to the next of kin.

To C.'s "family, to go in heirship for ever."

So, where A. devised lands unto his sister *C.'s family, to go in heirship for ever*, it was held that the eldest son and heir apparent of C. was entitled; though, in another part of the will, the word "family," applied to personal property, meant children; there being, it was said, no objection to the same word when applied to a different subject receiving a different construction: *Doe* v. *Smith*, 5 Mau. & Selw. 126.

"Family" held to mean children.

The word *family* has sometimes been construed to mean "children." Thus, in the case of *Barnes* v. *Patch*, 8 Ves. 604, a testator gave the remainder of his estate to be equally divided between "brother L.'s and sister E.'s *families*," and Sir W. Grant, M. R., decided that the will (which was held to carry real estate) vested the property in the *children* of the brother and sister.

"Family" synonymous with *relations*.

In other instances "family" has been treated as synonymous with *relations*. Thus, in the case of *Cruwys* v. *Colman*, 9 Ves. 319, a testatrix made her only sister whole and sole executrix to every thing she had for her own life, and willed that at her own death she bequeathed to those of her own *family* what she had it in her own power to dispose of that was the testatrix's, provided they behaved well to her. Sir W. Grant, M. R., held, that the words "her own family," were equivalent to her own *relations*; observing, that the word family might, according to the context, have different significations in different wills.

So, in the case of *Grant* v. *Lynam*, 4 Russ. 292, where a testator bequeathed a leasehold house to his wife for life, with a power of disposing of the same after her decease, "to any one of my own *family* she may think proper:" Sir J. Leach, M. R., held, that the word "family" was synonymous with relations; and, therefore, an appointment to a relation, though not next of kin, was authorised by the power.

[As to the influence which the nature of the property has upon the construction of the word "family," see 2 Jarm. Wills, 30, 31.]

GIFTS TO HEIR.

"Heir," in relation to personalty, how construed.

"Heir," *in relation to Personalty.*

Heir, though a word of well-defined and techninal meaning, often denotes, in relation to personalty, those who by law succeed thereto on the decease of an intestate owner, who, in a general, popular sense, may be considered the "heir," in respect of such property. Thus, where a testator bequeathed to A. 200*l.*, "and, failing him by decease before me, *to his heirs*," the legacy was held to belong to the next of kin of A. living at the death of the testator: *Vaux* v. *Henderson*, 1 Jacob & Walker, 388, n.; see also *Holloway* v. *Holloway*, 5 Ves. 399. [See the case of *Holloway* v. *Holloway* stated in Lord Cottenham's judgment in *Ware* v. *Rowland*, infra.] But these cases must not be understood to warrant the general proposition, that the word "heirs," in relation to personal estate, imports next of kin, especially if real estate be combined with it. Thus, in the case of *Gwynne* v. *Muddock*, 14 Ves. 488, where a testator gave all his real and personal estate to A. for life, adding, after her death his "nearest *heir-at-law* to enjoy the same;" Sir W. Grant held, that the heir-at-law took the real and personal estate, and not the realty only, the testator having blended both in the gift. And even where the entire subject of gift is personal, the word "heir," unexplained by the context, must be taken to be used in its proper sense; nor will the construction be varied by the accident that the description applies to a plurality of persons, since any number of co-heirs make but one "heir." See 2 Lord Raym. 829. Thus, the words, "to my *heir* 4000*l.*," were recently held to entitle three co-heiresses of the testator jointly; Sir J. Leach, M. R., neatly observing, "where the word is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word 'heir:'" *Mounsey* v. *Blamire*, 4 Russ. 384.

[In the recent case of *Ware* v. *Rowland*, 12 Jur. 165, Lord Cottenham held, that, by the words "to and among my heirs-at-law," a sum of stock passed to the heir-at-law of the testator at the time of his death. His Lordship observed: "Supposing the case of *Holloway* v. *Holloway* (5 Ves. 399) to lay down the rule correctly, I have no doubt of its governing this case. In that case, as in this, the testator had a daughter, to whom he gave the interest for life of a sum of money, which he directed to be taken out of his general estate and invested. In that case, as in this, after the daughter's death, her children, if any should be living at the time of her death, were to have the fund. If she left no children, part of the fund in *Holloway*

v. *Holloway* was to be held in trust for the personal representatives of the daughter, and the remainder of the fund in trust for such person or persons as should be the testator's heir or heirs-at-law. In the present case, in the event of the daughter not having children, the trusts are 'then,' that is, in that event, to sell the trust-monies, and to pay thereout to two other persons a certain part, if they should be severally living at that time; and then follow these words, 'All the rest and residue of the said principal trust-monies, with the interest, increase, and dividends, I give and bequeath to and among my heirs-at-law, share and share alike;' and in a subsequent part of the will the testator gives all the residue of his property to his daughter by name. In both cases the word 'then' is to be found, and in both it refers to the event, not to the time. In *Holloway* v. *Holloway*, part of the fund to be separated from the rest was, in the event of the daughter not having children, to be hers absolutely, and the gift to the heir was of the remainder of the fund; whereas, in the present case, if the persons to whom a part of the fund was given did not survive the daughter, the gift to them was not to take place; in which case, therefore, such part continued and constituted part of the general fund, and would pass with it and to the heir. In *Holloway* v. *Holloway* the trust for the heir is to 'such person or persons as shall be my heir or heirs-at-law,' there being at the testator's death three daughters, who were his co-heiresses-at-law and next of kin. The word '*shall*' seems to describe persons who should become heirs at a future time. In the present case, there being but one heir and next of kin, the testator gives to and among his '*heirs-at-law, share and share alike;*' he uses the plural though there was but one. In *Holloway* v. *Holloway* the testator used the singular though there were three heirs; he also describes the duty of the trustees to arise upon the death of the daughter without issue. In the present case, after describing these duties as to a portion of the funds to be set apart and paid to other persons, he makes a new and distinct gift to the heirs: 'All the rest and residue of the said principal trust-monies, with the interest, increase, and dividends, I give and bequeath to and among my heirs-at-law, share and share alike.' Having in view a provision for certain persons, not to be permanent except in particular events, he no longer declares any trust of the fund as a property, but, in truth, lets it fall into the residue of the estate, giving the fund, subject to such prior gift, to his heir, who (being his daughter) was his general and residuary legatee. In all the particulars in which the bequests differ, the differences in the case of *Holloway* v. *Holloway* are in favour of the claim of the future heirs; but Lord Alvanley,

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acting on the authority of the earlier cases, held that the heirs-at-law at the testator's death were the parties described. Such, he says, was the intendment of the law, and such must be understood to be the meaning of the testator, unless by the context or express words it plainly appears that he intended otherwise, of which he did not find sufficient proof in that case. But if Lord Alvanley could not find such proof in that case, I certainly cannot find it in this, thinking, as I do, there was much evidence on the face of the will tending to that proof in *Holloway* v. *Holloway*, which is wanting in the present case. There is, indeed, nothing of such tendency in this will, except the description of 'heirs' in the plural. I have already observed, there are in *Holloway* v. *Holloway* similar inadaptations of the expressions used to the state of the family, and there is, I think, in the present case, a very obvious solution of the apparent inconsistency. Suppose the testator, after making all such provisions as he was anxious about, found that, in certain events, all those provisions might fail, having no other object in view, he might naturally wish that the law with respect to the disposition of property should in that event take its course. If he had so expressed his wish, his heirs and next of kin would take in the event of the provisions failing; but as that might not take place till some distant period, it would be uncertain who would till that time stand in the place of such heirs, and the testator might, therefore, naturally express such wish in the terms he has used in this will. It is not at all inconsistent with such an expression as to failure or contingent interest, that he should give the residue of his property by a direct gift to his daughter by name; he might, for instance, have contemplated the possibility of his daughter's death in his own lifetime. Since *Holloway* v. *Holloway*, several cases have occurred, particularly *Jones* v. *Colbeck*, 8 Ves. 38, and *Miller* v. *Eaton*, Sir G. Coop. Rep. 272, which might have been supposed, on the authority of *Holloway* v. *Holloway*, to have received a decision different from that pronounced in them by Sir W. Grant; but in none do I find any disapprobation expressed of the decision of Lord Alvanley, or any intention entertained of overruling it; but in all distinctions are taken, which, whether tenable or not, leave the authority of the case untouched. In none, however, of these cases are there circumstances so strong in favour of the heir as are to be found in the present. There is, I think, no ground for the claim of the next of kin exclusive of the daughter: and she filling the character both of heir and next of kin, no question arises as to whether she took the fund in one character or the other. I therefore think the decree right, and that the appeal must be dismissed, with costs."]

CHILDREN, NEXT OF KIN, &c. OF SEVERAL PERSONS.

It may be useful to close the present section with a brief statement of some points respecting gifts to the children, heirs, next of kin, or relations of a plurality of persons. In framing such gifts care is requisite, in order to avoid various questions; such as—

Suggestions as to gifts to the children, next of kin, &c. of *several* persons.

1st. Whether the children, next of kin, &c., of the several persons named, are to take per capita or per stirpes, especially if the latter is intended; since otherwise the distribution would be per capita, not only where the gift is thus—to the children of A. and of B.; *Malim* v. *Keighley*, 2 Ves. jun. 333, 529; see *Lady Lincoln* v. *Pelham*, 10 Ves. 176; but also where it is to the children of A. and to the children of B.; *Malcolm* v. *Martin*, 3 B. C. C. 50; and if there should be children of one only, they will take the whole, Ib.; and even if there should be only one child of one of the persons named, and the terms of the bequest might seem exclusively adapted to a plurality of objects, the entirety will vest in such only child; see *Wicker* v. *Mitford*, 3 B. P. C. Toml. ed. 442;—a construction which accords with that given to the general Statute of Distributions, (vide post), which has been styled a "Parliamentary Will," 2 P. W. 443, and exhibits a similar omission to provide against the event of there being an only child: *Palmer* v. *Garrard*, Pre. Ch. 21.

Heirs of husband and wife construed to mean children.

2nd. Whether it is intended that the gift shall apply to the heirs, next of kin, &c., of the several persons *respectively*, or to persons who shall answer to the character of children, heirs, &c., of *both or all* (*a*). A limitation to the right heirs of persons who are actually husband and wife, and who are not related in blood, is held to mean heirs, i. e. children, of both. Thus, where a testator devised to H., daughter of A., in tail, with remainder to such child or children as the wife of the said A. was then encient with, in tail, with remainder *to the right heirs of A. and M. his wife for ever*, it was contended, that the limitation to the right heirs of A. and M. was intended to give an estate in moieties to the heirs of each; but the Court held, that, in order to entitle any person, it was necessary that he or she

(*a*) With respect to *children*, of course this question could not arise in regard to more than two, nor even then, if the individuals named were of the same sex, or, being of different sexes, were not husband and wife de facto, or capable of becoming such de jure. It has never been decided, whether a gift to the children of A. and B. (a man and woman not related in blood), means children proceeding from them both or respectively.

In defence of the seemingly useless plan, here and elsewhere adopted, of suggesting points without attempting the solution of them, it may be observed, that it serves to invite the attention of the draughtsman, in order that he may prevent, by explicit declaration, the occurrence of any such questions.

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should *answer the description of heir of both*, which could only apply (they being strangers in blood) to a child of both, the husband and wife being, in contemplation of law, one person only: *Roe* v. *Quartley*, 1 T. R. 630. In a modern case, a question was raised, whether a devise in favour of the next of kin of the testatrix's late father and mother, his or her heirs and assigns for ever, and if more than one, as tenants in common, applied to the next of kin of these persons (who were not related) *respectively*, or persons answering to the description of next of kin of *both*. The testatrix was a spinster of very advanced age. Lord Lyndhurst, C., decided in favour of the latter construction, remarking, that the testatrix contemplated that the next of kin might be *one* individual or more, which was inconsistent with the supposition that she meant next of kin of the father and next of kin of the mother, as they were not related: *Pycroft* v. *Gregory*, 4 Russ. 526. (But might she not have contemplated the possibility of the failure of the next of kin of one?)

Next of kin of testatrix's late father and mother.

3rd. It should also be distinctly shewn, that the children, &c., of *all* are intended, and not children in one instance and parents in the others, which is often the grammatical construction of words which are meant to have a different effect; for instance, a gift to "my brother and sister's children" will be read as applying to the brother and the children of the sister, and not to the children of both, as no doubt is intended; *Doe* v. *Joinville*, 3 East, 172; *Lugar* v. *Harman*, 1 Cox, 250; and (what is still worse) the brother would take only a share equal to that of one of the sister's children: *Blackler* v. *Webb*, 2 P. W. 383. The expression should have been, to my brother's and sister's children, or to the children of my brother and of my sister.

4th. If a contingency is to be introduced into the qualification of the objects, such as that of their being in existence at a given period, it should be made clearly apparent that it applies to the objects themselves, and not to the parents' ancestors, &c., though such, it appears, would be in general the adjudged construction; since a gift "to the children of my brothers and sisters, who shall be living at the time of my decease," has been held to import children who shall be living, and not the children of brothers and sisters who shall be living; as the latter reading re-models the sentence, making it children of *such* of my brothers, &c.: *Barker* v. *Lea*, 3 Ves. & Bea. 113.

XVII. What words create a tenancy in common.

TENANCY IN COMMON.

Joint tenancy, when created.

A gift to several persons simply, will, generally speaking, make them joint tenants, whether the subject be real or personal estate, without excepting even pecuniary legacies and residuary bequests, which have been sometimes supposed distinguishable: *Cray* v. *Willis*, 2 P. W. 529; *Barnes* v. *Allen*, 1 B. C. C. 181; *Stuart* v. *Bruce*, 3 Ves. 632; *Whitmore* v. *Trelawny*, 6 Ves. 129; *Crooke* v. *De Vandes*, 9 Ves. 197. In creating a tenancy in common, it is usual to express affirmatively and negatively that the co-devisees or co-legatees shall be tenants in common, and not joint tenants; but such explicitness of declaration is not essential. The words, "equally to be divided," and "share and share alike," will produce the same effect; *Doe* v. *Vaughan*, 1 Dowl. & Ryl. 52; *Clayton* v. *Lowe*, 5 Barn. & Ald. 636; having been adjudged, indeed, adequate to sever the tenancy, even in the instance of a deed: *Rigden* v. *Vallier*, 2 Ves. sen. 252. In a will much slighter expressions will suffice. Thus, devisees or legatees have been held to be tenants in common under a gift to several persons *equally*; *Warner* v. *Hone*, 1 Eq. Ca. Ab. 292, pl. 10; or even to them *respectively*; *Heathe* v. *Heathe*, 2 Atk. 121; [see also, *Torret* v. *Frampton*, Sty. 434; *Marryat* v. *Townly*, 1 Ves. sen. 102;] or where the limitation was to the heirs of the devisees as they should "severally" die; *Sheppard* v. *Gibbons*, 2 Atk. 441; also, where the gift was expressed to be to A. and B. "*between them*;" *Lashbrook* v. *Cock*, 2 Mer. 70, 118; see also *Perkins* v. *Baynton*, 1 B. C. C. 118; or to be enjoyed "*alike*:" *Loveacres* v. *Blight*, Cowp. 352; see also *Thorowgood* v. *Collins*, Cro. Car. 75. And a direction introduced into a bequest of leaseholds, that the legatees should bear an annual charge *in moieties*; *Kew* v. *Rouse*, 1 Vern. 253; and words referring to the "shares" of co-residuary legatees; *Dodson* v. *Day*, 3 B. C. C. 405; have respectively been held to make them tenants in common.

Expressions which create a tenancy in common.

The great characteristic of a joint tenancy is survivorship; which, however, is liable to be defeated by a severance of the tenancy; and, consequently, a qualified gift to the survivor of several co-devisees or co-legatees, in the event of the death of either, under certain circumstances, being exempt from such hazard, is consistent with, and therefore does not negative the construction of, a joint tenancy: *Barnes* v. *Allen*, 1 B. C. C. 181. Nor does an express gift of part of the property to the legatees, as tenants in common, necessarily imply an intention that they shall take, in a similar manner, other parts not so expressly given: *Jackson* v. *Jackson*, 7 Ves. 535.

Effect of a qualified gift to survivors.

TENANCY IN COMMON.

Sometimes a gift contains expressions respectively pointing at a joint tenancy and a tenancy in common. In such case one must yield, and the former, it is probable, would generally be selected, on account of the well-known bias in favour of a tenancy in common. See *Perkins* v. *Baynton*, 1 B. C. C. 118, (where the expression was, "jointly and between them"). In some instances, the seeming discrepancy has been avoided by holding the co-legatees to be joint tenants of a particular interest (as for life), and tenants in common of the ulterior interest: *Gardiner* v. *But*, 3 Madd. 425; vide also, as to devisees in tail, post. But a legacy to two, to be equally divided when they should arrive at twenty-one, has been held to make the legatees tenants in common, immediately, so that, on the decease of one under age, her share went to her representatives, and not to the survivor: *Jolliffe* v. *East*, 3 B. C. C. 25.

Contradictory expressions.

Gifts to classes.

The rule which construes a gift to two or more simply as creating a joint tenancy, applies indiscriminately to gifts to individuals and classes, including, it should seem, gifts to children, in disregard of Lord Hardwicke's objection, in *Rigden* v. *Vallier*, 2 Ves. sen. 258, to apply the construction to provisions by a father for his children, on account of its subjecting them to be defeated by survivorship, which does not appear to have been attended to.

Different periods of vesting held to be inconsistent with a joint tenancy.

However, a gift by will, under which all the members of the class are not necessarily entitled at the same instant of time, but which vests the property in the existing objects, with a liability to be divested pro tanto in favour of after-born objects, was recently decided, by reason of the different periods of vesting, to create a tenancy in common. The case was as follows:—Stock in the public funds was bequeathed to A. for life, and, after her decease, the capital to the children when they arrived at the age of twenty-one years. It was contended, that the legatees were tenants in common, according to the position in Coke on Litt. 188. a., that "if lands be demised for life, the remainder to the right heirs of J. S. and J. N., J. S. hath issue and dieth, and after J. N. hath issue and dieth, the issues are not joint tenants, because the one moiety vested at one time and the other moiety vested at another time." Sir L. Shadwell, V. C., said, "It is contrary to the rule of law that persons who are to take at different times can take as joint tenants; the property must vest at once. From the necessity of this case, the children who attained twenty-one must take as tenants in common:" *Woodgate* v. *Unwin*, 4 Sim. 129.

Tenancy in common where the gift vests in the objects at different times.

It is observable, that, in the case of *Stratton* v. *Best*, 2 B. C. C. 233, a contrary rule was applied to the limitations of a deed. By a

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marriage settlement lands were limited in trust for the intended husband for ninety-nine years, if he should so long live, with remainder (subject to a power of appointment) in trust for the intended wife for life, with remainder in trust for all and every the child and children of the husband, begotten on the body of the intended wife, and their heirs for ever. It was contended, that, as the shares of children would vest at different times, they were tenants in common; but Lord Thurlow decided contrarily, observing, that, whether the settlement was to be considered as the conveyance of a legal estate [qu. to the trustees?] or a deed to uses, would make no difference; *and that the vesting at different times would not prevent its being a joint tenancy.* It is to be regretted that this case was not cited to the Vice-Chancellor. In the case put by Lord Coke, the instrument was a demise at common law, and his doctrine has been usually considered as not applying to conveyances to uses or to wills; but both Lord Thurlow and Sir L. Shadwell seem to have concurred in disregarding this distinction, though their decisions agree in no other point.

Trusts arising by implication from powers of distribution and selection.

Where a trust is raised by implication from a power of *distribution* among a class of defined objects, (vide ante, p. 264), they take as tenants in common; *Reade* v. *Reade*, 5 Ves. 744; *Casterton* v. *Sutherland*, 9 Ves. 445; *Kennedy* v. *Kingston*, 2 Jac. & Walk. 431; overruling *Maddison* v. *Andrews*, 1 Ves. sen. 157; but where, from a power of *selection*, it is probable that the objects of the implied gift would be held to be joint tenants.

And here, it may be observed, that the decease, in the lifetime of the donee, of any member of a class to whom a testamentary power of selection or distribution extends, does not defeat the power pro tanto, but the entirety may be appointed to the survivors: *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 299. See also *Butcher* v. *Butcher*, 9 Ves. 382; 1 Ves. & Bea. 79. Sir Edward Sugden, however, is of opinion, that this doctrine is confined to cases in which the entire property vests in the survivors; and that, if the objects of the gift, in default of appointment, take as tenants in common, among whom there is no survivorship, the power, by the decease of any one or more of the objects, is defeated pro tanto; (Treat. Pow., 5th ed., 479); but it may be doubted whether there is any solid ground for such a distinction between the effect of survivorship and lapse; and the case of *Reade* v. *Reade*, 5 Ves. 774, which is the authority cited by this eminent writer, has been characterised by Lord Eldon, (1 Ves. & Bea. 92), and is admitted by him-

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Implied gift to children held to mean children at death of donee.

self, to be unintelligible (*a*). The question would be altogether avoided by holding (as was done by Sir T. Plumer, M. R., in one instance), an implied gift arising out of a power of distribution among children to apply to children *living at the death* of the donee: *Kennedy* v. *Kingston*, 2 Jac. & Walk. 431; (but which compare with *Malim* v. *Barker*, 3 Ves. 150). If, in *Kennedy* v. *Kingston*, the Master of the Rolls was authorised to say, that the power was exercisable among children living at the death of the donee only, then his decision was clearly right; for it seems to be an admitted principle, that the period of ascertaining the objects of the power and of the gift must be the same; on which ground it was held, that a gift in favour of children, implied from a power of *bequeathing* to children, was confined to children living at the death of the donee, this being obviously the period at which the objects of an appointment *by will* are to be ascertained: *Walsh* v. *Wallinger*, 2 Russ. & M. 78.

Co-devisees in tail, tenants in common, when.

Estates tail are the subject of some peculiar distinctions in regard to the nature of the tenancy subsisting between the co-devisees. If they are persons who may have common heirs of their bodies, being husband and wife, or a man and woman who may then lawfully marry, they are tenants in tail by entireties, or jointly, as the case may be. Where, however, the devise is to persons who are not husband and wife, or who cannot lawfully marry, (as in the instance of a devise to the children of A. in tail), so that they cannot have or be presumed to have common heirs of their bodies, the devisees are tenants in common in tail: Co. Litt. 184. a.; *Huntley's case*, Dy. 326 a; *Cooke* v. *Cooke*, 2 Vern. 645; *Perry* v. *White*, Cowp. 777. But even then the joint tenancy takes effect so far as it can, the construction of the devise being, that the devisees are *joint tenants for life, with several inheritances in tail: Wilkinson* v. *Spearman*, in

(*a*) [Mr. Jarman, in his Treatise on Wills, Vol. 2, p. 168, after stating the distinction for which the case of *Reade* v. *Reade* is the authority, adds in a note: "See also 1 Sugd. Pow. 6th ed., 534, where great pains have been taken to establish the position in the text, in opposition to some remarks of the present writer in his vol. appended to the the 3rd edition of Powell on Devises, (p. 374), which remarks he has not here repeated; for though he is still unable to discover any solid ground for the alleged difference of effect in regard to the power, where the partial failure of the gift takes place *before*, and where it occurs *after* the death of the testator; yet as the cases commented on by the distinguished writer in question seem to favour such a doctrine, and as it is really of more importance that the rules on such points should be certain, than that they should be decided in the manner most consistent with principle, he has not felt disposed to revive the discussion."]

Dom. Proc. cit. 2 Vern. 545, 2 P. W. 530. See also Co. Litt. 182. a. TENANCY IN COMMON.

The notice of these points has somewhat anticipated the observation, that where real estate is limited by deed or will for an estate of inheritance or freehold concurrently to two persons who are husband and wife, they take by entireties and not as joint tenants, and the lands thus limited devolve to the survivor, unaffected by the separate alienation of either husband or wife, whose incapacity singly to exercise the jus disponendi over any part of the property is the consequence of their unity of person, which makes their concurrence essential to any such act: Co. Lit. 187. a.; *Doe* v. *Parratt*, 5 T. R. 652. Tenants by entireties.

Another consequence of this unity of person (and one which it is often important for the draftsman to bear in mind), is, that where property is given to a husband and wife concurrently with any other person or persons, they are computed as and take the share of one only: *Lewin* v. *Cox*, Moore, 558, pl. 752; *Anon.*, Skinn. 182; Co. Litt. 187. a. [It seems, however, that the construction of these gifts depends on the framing of the sentences in which they are made, so that if the husband and wife are mentioned first, (as in Littleton's example,—"also if a joint estate be made of land to a husband and wife and to a third person, in this case the husband and wife have in law in their right but the moiety," s. 291), they will together take only one share; but if they are named last in the sentence, without an "and" preceding the husband's name, each will take a share: *Bruker* v. *Walley*, 1 Vern. 233, 4 Vin. Ab. Bar. & Fem. (M. a.), pl. 9; *Warrington* v. *Warrington*, 2 Hare, 54. Littleton, however, gives a reason for the rule which is wholly irrespective of the grammatical form of the gift.] Husband and wife regarded as one person.

XVIII. LIMITATIONS TO SURVIVORS.—CLAUSE OF ACCRUER. LIMITATIONS TO SURVIVORS.

[Although it is now a settled rule of construction, that the word "survivor" is to be read in its strict and natural sense, without regard to the presumable intention of the testator, unless the context of the will itself puts a different construction on it, yet in one or two instances the Courts appeared willing to avail themselves of any ground afforded by the context for reading the word "survivor" as synonymous with "other."]

Thus, in the case of *Wilmot* v. *Wilmot*, 8 Ves. 10, (see also *Harman* v. *Dickenson*, 1 Br. C. C. 91), where a testator bequeathed to Word "survivor" construed as syno-

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nymous with *other*, when.

his son A. one-third part of what he might die possessed of, to be put out at interest, but the son was not to be put in possession until the age of twenty-five years; and the testator gave to each of his daughters, B. and C., one-third of what he might die possessed of, to be put out at interest, but they were not to be put in possession until the age of twenty-one years; and the testator willed, that, in case of the death of either of the above-named children before they attained the before-mentioned ages, the said third part which would have been coming to the deceased child might be equally divided between the *two surviving children*, and, in the event of the death of two of the above-mentioned children before they attained the said respective ages, then it was the testator's will that the whole of what he might die possessed of should devolve to the *surviving child;* but should all his children die before they attained their said respective ages, then the whole of his estate was to devolve to the testator's brothers D. and E., and their heirs. B. attained twenty-one, and died; A. afterwards died under twenty-five. A petition was presented by D., the only surviving child, claiming the entire share of A.; but Lord Eldon held, that the administrator of B., the deceased child, was entitled to participate, his Lordship being of opinion, that the word "surviving" here meant the same as "other," or "living at the age aforesaid." He remarked, that, in the clause in which the gift over is made, it was never intended that any portion should be taken: it was to be either the whole or none.

Remark upon *Wilmot* v. *Wilmot.*

In this case the context evidently favoured the construction adopted by the Court; for it was apparent, from the tenor of the clause, that an entire share was not to accrue to a single survivor, unless and until *two* of the legatees had died under the prescribed ages.

The next instance in which the liberal construction of the word "survivors" occurs, is *Barlow* v. *Salter*, 17 Ves. 479, where a testator, in a certain event, directed all his real and personal estate to be divided between his four nephews and nieces, N., W., C., and E.; C.'s part only for life, *and her part to be divided between the survivors*—Sir W. Grant, M. R., treated it as clear that C.'s share, at her death, would go to the other three legatees, whether then living or not, observing that "survivors," as here used, had the same sense as "others," as had been frequently decided.

Remarks upon *Barlow* v. *Salter.*

This case is certainly more destitute of grounds for changing the words "survivors" into "others," than *Wilmot* v. *Wilmot;* but it is to be remarked, that the point was only incidentally adverted to by the Master of the Rolls, whose opinion on it formed no part of, though it may have influenced, his adjudication. His Honor's dic-

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tum, however, coupled with the rather general remarks of Lord Eldon in *Wilmot* v. *Wilmot*, and some positions advanced by Lord Alvanley in the case of *Milsom* v. *Awdry*, 5 Ves. 465, are sufficient to account for the notion which obtained extensively in the profession, that "survivor" might even, without any explanatory context, be read as importing *other*—a notion that now stands corrected by numerous decisions, which shew that this word, like all others, must, when unexplained by other parts of the will, be construed according to its natural and proper signification.

"Survivor" construed strictly, and not as importing *other*.

Thus, in the case of *Davidson* v. *Dallas*, 14 Ves. 576, where a testator bequeathed to the children of his brother, R. D., 3000*l*., to be equally divided among them, and if either of them should die before the age of twenty-one years, their share to go to the *survivors*:—Lord Eldon, after referring to the rule for construing "survivors" as importing *others*, observed that there was nothing in this will indicating a general intention, upon which the forced construction of the term "survivors" had been adopted. The words must therefore have their natural meaning.

So, in the case of *Crowder* v. *Stone*, 3 Russ. 217, where a testator bequeathed certain stock in the funds to his executors, in trust for his wife and brother for their respective lives, and after the decease of the survivor, to be divided equally between his nephew and four nieces, and in case of the death of his said nephew, or of any or either of his said nieces without issue before their respective parts or shares should become due and payable to them, then the part or share of him, her, or them so dying without issue as aforesaid should go to and be equally divided between and amongst the *survivor and survivors* of them, share and share alike. At the decease of the testator's wife, one niece only survived; some of the deceased nieces had and others had not left issue. Lord Lyndhurst held, that the survivor was entitled to the whole (*a*). "It was contended," he observed, "that the words 'survivor and survivors of them,' were to be construed 'other and others.' That is a construction which the Court has, in some cases, put upon those or similar words; but it is what Lord Eldon, in *Davidson* v. *Dallas*, calls a 'forced construction of the term survivor,' 14 Ves. 578, and he contrasts it with what he calls 'its natural meaning.' It is a construction which the Court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will; and in *Wilmot* v. *Wilmot*, it was scarcely pos-

(*a*) [The decision was, that, on the death of each legatee without issue, his share *vested* in the other legatees then living, and that the shares so accruing did not go over to the ultimate survivor.]

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sible to put any other meaning on the words. But, in looking at the language and the provisions of this will, I do not find any such necessity; and it seems to me, the words 'survivor and survivors' are here to be taken in their natural meaning. The shares, which became subject to the operation of the bequest to the survivor and survivors, will be divisible among such only of the five legatees as were living at the time when the events happened on which the shares were to go over respectively." [See also *Ranelagh* v. *Ranelagh*, 2 Myl. & K. 441; *Cromek* v. *Lumb*, 3 You. & Coll. 565; *Cursham* v. *Newland*, 2 Beav. 145; *Willatts* v. *Willatts*, 12 Jur. 670.]

General conclusion from the cases.

These decisions agree with and are fully supported by the earlier cases of *Ferguson* v. *Dunbar*, 3 B. C. C. 469, n.; and *Milsom* v. *Awdry*, 5 Ves. 465: the whole constituting a chain of authority sufficiently strong to preclude the slightest hope of maintaining the enlarged construction of the word "survivor," without an explanatory context. And the circumstance, that there occurs in the same will, in reference to another subject or other objects, an instance of the words "survivor" and "other" being used conjunctively, is not considered to imply an intention to give to the word "survivor," standing alone, their united force or signification.

Effect of "survivor" being in some instances associated with "other."

Thus, in the case of *Winterton* v. *Crawfurd*, 1 Russ. & Myl. 407, where a testator devised the residue of his real estate to trustees, upon trust as to one third to pay the rents to the separate use of his daughter Harriet during her life, and after her decease, in trust for all her children, in equal shares, and the respective heirs of their bodies; and in case one or more of such children should die without issue, then as to his, her, or their share or shares, in trust for the survivors or survivor and others or other of them; and after giving the other two thirds by similar limitations to his daughters Louisa and Fanny, with remainder to their children, the testator proceeded to declare, that in case one or more of his said daughters should die without issue of her or their body or bodies, then the share or shares of her or them so dying should be in trust for the *survivors or survivor* of them for the lives or life of such *survivors or survivor*, to be held and enjoyed by the trustees for the joint natural lives of such *survivors* of the testator's said daughters, in trust for them as tenants in common, and the rents and profits of the accruing share or shares to be for their separate use, and after the decease of the *survivor* of his said daughters, in trust for the child and children *of the survivors or survivor* of his said daughters per stirpes, and the heirs of the bodies of such child and children; and in case any one or more of such children should die without issue, then as to the shares of him, her, or

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them so dying, in trust for the *survivors or survivor, others or other* of them, and the heirs of the body of such survivors or survivor, others or other of them; and if all such children but one should die without issue, in trust for such surviving or only child and the heirs of his or her body; and in default of such issue, in trust for testator's nephews. Fanny died, leaving children. Louisa afterwards died without children, and the share of Louisa was claimed by and was now held to belong to Harriet, the only surviving daughter, to the exclusion of the children of Fanny—Sir J. Leach, M. R., said—"In order to effectuate the intention of the testator, the Court sometimes gives to the word 'survivor' the sense of 'others.' Here the expressions of the testator are too precise to impute to him such an intention; and the survivors are to take as tenants in common for life for their separate use, which is wholly inconsistent with the notion that the testator meant that the children of a deceased daughter should, as to this third share, stand in the place of their parent. It is true, that, in the gift over after the death of the surviving daughter to the children of the survivors or survivor, the words 'survivors or survivor' may receive a more enlarged meaning. The intention of the testator appears to have been, that no part of his real estate should go over to his nephews, except in the event of the failure of issue of all his three daughters; and this intention would be defeated, if, upon the death of Lady Winterton (*a*) without issue, which is stated to be a probable event, the children of the deceased sister were excluded. This question cannot, however, be decided during Lady Winterton's life; and all that can now be done is to declare, that Lady Winterton is entitled for life, to her separate use, to the one-third share of the real estate, which by the will was given to her sister Louisa."

Remarks upon *Winterton* v. *Crawfurd.*

The reasoning of the Master of the Rolls, in regard to the inconsistency between the devise *for life* to the survivors, and the notion that the children of the deceased devisees were to stand in their place, is inconclusive, because, though the devise for life could not take effect in regard to any deceased child, the devise in remainder to the issue of such child might. Indeed, if his Honor was right in the opinion expressed by him, that, after the death of the last surviving daughter, the property would go over to the children of the deceased daughter, and not to the ulterior devisees, there would seem to be great difficulty in upholding his decision, as it would involve the absurdity of reading the same words in two different senses. The case, too, would then be in direct opposition to *Doe* v. *Wainwright*, 5 T. R. 427,

(*a*) This lady was Harriet, the survivor of the three daughters.

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where, *even in a deed*, the limitation of cross remainders in tail to *surviving* children was held to take effect in favour of the issue of a deceased child, on the sole ground of its appearing, by the terms of the ultimate devise, that the estate was not to go over, unless the issue of *all* the children failed.

[In *Leeming* v. *Sherratt*, 2 Hare, 14, a testator bequeathed 1000*l.* to each of his six children, to be paid at twenty-one, except as to girls, one-half of whose shares was to be invested, and the interest to be paid to them for life, and the principal to be disposed of in such manner as they should direct, to their issue; and in case they should die without issue, he gave the principal among the survivors of his children in equal proportions. The testator then gave his freehold property and the residue of his personalty to trustees, the proceeds to be divided among his children when the youngest should attain twenty-one; one-half of the daughters' shares to be invested, the interest to be paid to such daughters, and the principal to be disposed of in such manner as they should direct, among their children; but if there were no children, then such share to be divided equally among the *survivors* of the testator's children: and in case of the death of any of his children, leaving lawful issue, the testator gave to such issue the share the parent so dying would have been entitled to have. One question was, whether the words "survivors of my children" was to be construed *others*. Sir James Wigram held, that the strict construction must prevail. He said: "In *Davidson* v. *Dallas*, 14 Ves. 576, Lord Eldon's language obviously imports that the word 'survivors' is to be construed in its natural sense, unless the will itself shews that it was used by the testator in a different sense; and *Crowder* v. *Stone*, 3 Russ. 217, is to the same effect. In *Barlow* v. *Salter*, 17 Ves. 479, the dictum of the Court tends rather to treat the word as having a technical meaning (that of 'others') impressed upon it in practice. According to *Davidson* v. *Dallas*, one reason for construing 'survivors' to mean 'others,' has been to take in all persons who should be born before the period of distribution. In other cases the object suggested has been to prevent a family losing the provision intended for it by the death of a parent, leaving children. The reason of the former of these cases could not occur here, in the case of the residue, because the testator's own children are the legatees of that residue. And, according to the construction that I feel myself at liberty to put upon that clause in the will, which, in certain cases, substitutes the issue for the parents, I think the testator has guarded against the second inconvenience; and, so far at least as the residue is concerned, I think that, in the residuary clause, the word 'survivor' must be

construed in its natural sense, and that this construction of the word, in one part of the will, must, in this will, determine its construction in the other part also."]

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Effect where gift over is combined with a collateral event.

[" In a recent case, however," observes Mr. Jarman, 2 Treat. on Wills, 616, " it was considered, that, where the gift to the survivors was to take effect in the event of the decease of any of the prior objects of gift *combined with some collateral event*, the rule of construction adopted in the preceding cases did not apply, but that the word 'survivor' might be construed *other*, on the ground, it should seem, that, as in such cases the ulterior or substituted gift is not to take effect absolutely and simply on the decease of the prior objects, it is the less likely that the testator should intend survivorship to be an essential ingredient in the qualification of the ulterior or substituted legatees." See *Aiton* v. *Brooks*, 7 Sim. 204, where, however, the gift was " to the survivor of them, *her executors or administrators*," and Mr. Jarman's remarks on the doctrine advanced in that case: 2 Jarm. Wills, 617. Mr. Jarman thus states the general conclusion from the cases, with a practical suggestion: " The result then would seem to be, that the word 'survivor,' when unexplained by the context, must be interpreted according to its literal import; but the conviction that this construction most commonly defeats the actual intention of testators, will no doubt induce a readiness in the Courts to listen to any arguments drawn from the context for reading the word 'survivor' as synonymous with *other*. And the writer cannot dismiss the subject without the cautionary remark, that the present state of the authorities, by cutting off the hope of any considerable aid from liberality of construction in correcting this often-occurring slip, should teach to framers of wills the necessity of increased attention to its avoidance."]

Clauses of accruer should be extended to accruing shares.

Unless the clause in express and unequivocal terms embrace accruing as well as original shares, an intention to this effect cannot, consistently with the established construction, be implied. For instance, in the case of a legacy to A., B., and C., in equal shares, with a proviso, that, in the event of any of them dying under the age of twenty-one years, the share or shares of him, her, or them so dying should go to the survivors or survivor, others or other. If A. dies under twenty-one years, leaving B. and C. surviving, and B. afterwards dies under that age in the lifetime of C., that portion of the share of A. which had previously accrued to B. under the clause in question would not, on the death of the latter, go to C. with the original share of B., but would belong to the representatives of B. as part of his personal estate, the word " share " being confined to the original share; *Wood-*

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ward v. *Glasbrook*, 2 Vern. 388; *Ex parte West*, 1 B. C. C. 575; *Crowder* v. *Stone*, 3 Russ. 217; [*Rickett* v. *Guillemard*, 12 Sim. 88;] a result which is manifestly contrary to every reasonable conjecture of intention. [See 2 Jarm. Wills, 620, 621.] As a matter of course, therefore, the shares, both original and accruing, of the several objects should be expressly subjected to the clause of accruer, as in the examples of this clause to be found in the Precedents of the present work. Slight expressions have been held to be sufficient for this purpose; thus, in *Milsom* v. *Awdry*, 5 Ves. 465, the words "in manner aforesaid," introduced into the gift of the accruing shares, were decided to have the effect of subjecting them to the operation of the clause of accruer. See also *Worlidge* v. *Churchill*, 3 B. C. C. 465. [See also *Eyre* v. *Marsden*, 4 Myl. & Cr. 231; *Leeming* v. *Sherrat*, 2 Hare, 14; *Sillick* v. *Booth*, 1 You. & C. C. C. 121.]

[In the recent case of *Goodman* v. *Goodman*, 12 Jur. 258, a testator gave one-seventh of the residue of his estate in trust for each of his seven children for life; after the death of any of his children, the capital of such deceased child's share to go to the children of such child; and in case any of his children should die without issue living at their death, to be divided equally amongst the survivors of his said children, and the children or issue of such of them as should be then dead, in the manner thereinbefore directed concerning the original shares. His seven children survived the testator. E. and L., two of his children, died leaving children; then P., another child, died without issue; and then M., another child, died without issue. Vice-Chancellor Knight Bruce held, that upon M.'s death her one-sixth of P.'s seventh share became divisible in fifths in a similar manner. His Honor observed: "The consideration, that, to accede to the executor's argument would create an intestacy,—a partial intestacy,—is not wholly beside the question. It has appeared to me, that perhaps the particular language of the clause against alienation may also deserve attention. Upon either or both of these considerations, I am of opinion, that, after the cases of *Milsom* v. *Awdry*, *Eyre* v. *Marsden*, and *Leeming* v. *Sherratt*, I may venture to put that construction upon these words which I am perfectly satisfied the testator himself would put, or would wish to have put, upon them, if he could be consulted. Therefore, I venture to apply the clause to the accruing share. The exceptions were neither allowed nor overruled; and it was declared, that, on Philip's death, his seventh share became divisible in sixths, the testator's surviving children taking for life, with remainder to their respective children; and that, upon Mary's death, her one-sixth of Philip's seventh share became divisible in fifths in a similar manner."]

XIX.—Indefinite devise comprised the fee, when.—As to the absolute interest in leaseholds.

DEVISES ENLARGED TO A FEE BY IMPLICATION.

Indefinite devise passes only an estate for life.

A devise of freehold or copyhold messuages, lands, tenements, or hereditaments, either in general terms, or by a local or other particular description, not including the word "estate" or "property," or any equivalent expression, did not, in a will made before 1838, carry more than an estate for life, though the testator might have shewn, by expressions in the introductory part of the will, an intention to dispose of his whole estate; *Denn* v. *Gaskin*, Cowp. 657, Doug. 731; *Doe* v. *Wright*, 8 T. R. 64; *Doe* v. *Allen*, Id. 497; or have given a nominal legacy to his heir apparent or presumptive; *Roe* v. *Bolton*, 2 Bl. 1045; *Right* v. *Sidebotham*, Doug. 730; *Roe* v. *Daw*, 3 Mau. & Selw. 518; or have intimated an intention wholly to disinherit him; *Awse* v. *Melhuish*, 1 B. C. C. 519; *Right* v. *Compton*, 9 East, 267; or though the devise is to a class, including the heir, as to the testator's children; *Dickins* v. *Marshall*, Cro. El. 330; *Doe* v. *Tucker*, 3 Barn. & Ad. 473; or to one or more of a class of devisees to be nominated by another, as to such son or sons of A. as he should by will appoint; *Fairfax* v. *Heron*, Pre. Ch. 67; or though the devise contained words importing equality of division; *Goodwyn* v. *Goodwyn*, 1 Ves. sen. 227 (a very weak ground certainly for varying the construction); or though there was in another part of the will or in the immediate context a devise *expressly for life*, affording the argument, therefore, that the testator meant something different by an *indefinite* devise; *Goodtitle* v. *Edmonds*, 7 T. R. 633; *Doe* v. *Clarke*, 2 New Rep. 343; [*Doe* d. *Viner* v. *Eve*, 5 Ad. & Ell. 317; *Silvey* v. *Howard*, 6 Ad. & Ell. 253]; (one of such express devises being an antecedent gift to the heir of the lands in question; *Awse* v. *Melhuish*, 1 B. C. C. 58); or though the testator, after describing the land, adds, "which I purchased for 600 guineas" (this being the price he paid for the inheritance); *Doe* v. *Parratt*, 3 Barn. & Ad. 469; notwithstanding the occurrence of any, or probably of all, these circumstances, it is indisputably clear that an indefinite devise in a will made before 1838 conferred only an estate for life.

Grounds for enlarging indefinite devise to a fee.

This rule of construction was entirely technical, being at variance with the popular notion, which regards the gift of the corpus of any subject, without discrimination between real and personal estate, as comprehending all the testator's interest therein. A conviction that the construction was hostile to the intention of testators, induced the Courts to lend a willing ear to grounds for departing from it, when-

DEVISES ENLARGED TO A FEE BY IMPLICATION.

ever a plausible pretext for their doing so could be offered. Hence have arisen the various classes of cases in which indefinite devises have been enlarged to a fee by construction or implication, which are too numerous to receive more than a very slender notice. The principal admitted grounds for such enlargement were—

Operation of the words "estate" and "property" to confer a fee.

First. Where the word "estate," or "property," or some other equivalent expression was used in the body of the gift, which words carried the fee, though associated with words of locality, or other expressions pointing at the corpus of the land, as "my *estate* at or in A.;" Amb. 181, Forrest. 157, 2 P. W. 523, 2 Atk. 37, 1 T. R. 411, 6 Taunt. 317, 3 Russ. 145, [1 Exch. Rep. 414]; or, "all that *estate* I bought of A.," 2 Ves. sen. 48; or, "my estate of A.," 4 Dow, 92; "my *estate*, or lands, &c., called by the name of the Coal Yard, in the parish of St. Giles, London," 7 East, 259; or, "my *estate*, consisting of thirty acres, with the dwelling-house, &c., situate at ————, now in the occupation of A.:" 3 Moore, 563. See also 7 Taunt. 35. And the introduction elsewhere in the will of the word "estate," in devises expressly creating an estate in fee, or an estate for life, did not vary the construction of the same word used in an indefinite devise: 6 Taunt. 317—410, 3 Russ. 145. In some instances, the word "estate" has been held to carry a fee, where employed to designate a subject antecedently devised by a descriptive term not extending to the testator's interest, as where a testator devised lands to A. for life, and after his decease gave "*the said estate*" to B.: 4 Mau. & Selw. 366, 6 Taunt. 317; but see 8 East, 141. Vide a converse case, 3 Barn. & Ad. 473. The last-mentioned decision, and more especially the case of *Doe* v. *Clarke*, 1 Cr. & Mee. 39, which is less susceptible of being referred to special grounds, strongly injoin caution in applying the rule which reads the words "estate" or "property," under various combinations of phrases, as carrying a fee.

How the word "estate" must have been used to pass the fee.

["I admit that the word 'estate' may be so coupled with other words as to explain the general sense in which it would otherwise be taken, and to confine it to mean *farms and tenements*." Per Lord Kenyon, C. J., *Fletcher* v. *Smiton*, 2 T. R. 659. In almost all the cases in which the word "estate" or "property" occurring in a devise has been held to mean the testator's estate or interest, the expression has been "*My* estate," or "*My* property,"—words easily referable to the amount of interest possessed by the testator. This was urged in the argument in the case of *Phillips* v. *Allen*, 7 Sim. 446, (see pp. 465, 470), where the words were "*The* estate;" and though on other grounds the Vice-Chancellor, and one of the

Judges of the Court of King's Bench, held that the fee passed in that case, the Vice-Chancellor said, "I was very much struck with the observation made by Mr. Atkinson, as to the effect of the word 'estate,' as coupled with the word 'my.'"]

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[Thus, in the leading case of *Bridgewater* v. *Bolton*, 1 Salk. 236, 6 Mod. 110, the devise was of "All *my* estate," and Holt, C. J., said, "*all his estate*, is a description of his fee." In the report in 6 Mod. he is made to add, "In the next place there are *words of relation:* it is not only '*the* estate,' but '*my* estate;'" and he enlarges on the force of the word "my." In *Jackson* v. *Hogan*, 3 B. P. C. 388, (Toml. ed.), 1 Cowp. 299, the words were in substance the same:—"All the *effects*, both real and personal, I shall die possessed of." So in *Bailis* v. *Gale*, 2 Ves. sen. 48: "All that estate I bought of A." In *Sharp* v. *Sharp*, 6 Bingh. 63, 4 Moo. & P. 445, where the words were, "*A* freehold estate," there were also the words, "with all right and title to the same;" and there was a general gift to the same person of "All my remaining *property*." In *Randall* v. *Tuchin*, 6 Taunt. 410, the testator, after using a description by locality and abuttals, proceeded thus:—"All which estates, being copyhold, and held of the manor of Kennington, I give to Mary P. for life, and after her decease to her son Marinus P." It was held that Marinus P. took the fee. There were corroborative circumstances, but as there was no estate previously created, the word estate necessarily incorporated itself with the introductory words, and meant the testator's estate. *Roe* d. *Allport* v. *Bacon*, 4 Mau. & Selw. 366, was similar in its circumstances to *Randall* v. *Tuchin*.]

"*My* estate.' &c.

Randall v. *Tuchin* (a strong case in favour of the word *estate* passing the fee).

[In the two last-mentioned cases, and in the few other cases in which the word "my" did not occur, the word "estate" was used in describing or introducing for the first time the subject-matter of the gift, so that the article "a" or "the" was used with the force of "my." Thus, if a testator says, "I give *the* brown horse," or "*a* brown horse which I bought at ——:" this is a loose way of saying "*my* brown horse."]

Observation on *Randall* v. *Tuchin*, &c.

[In the cases last referred to there was also this important element, that the word which was held to carry the fee did not merely occur in the description, but was part of the gift itself—the "estate" was the thing given, the substantive governed by the word of gift. In *Randall* v. *Tuchin* this distinction was clearly pointed out by Heath, J., "The principle is, that where the word 'estate' *is an operative word* it passes a fee; and *to try whether it be operative or not the test is, to strike it out of the will*, which test being applied here

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the devise becomes nonsense." Accordingly, in *Doe* d. *Clarke* v. *Clarke*, 1 Cr. & Mee. 39, where the word occurred in the description parenthetically, but was not used in the gift or operative part, ("I give to my brother all that dwelling-house, &c., the said *property* lying and being in &c."), it was held, that the fee did not pass. So, in *Doe* d. *Norris* v. *Tucker*, 3 B. & Ad. 473 (recognised in *Doe* v. *Lawes*, 7 Ad. & Ell. 206) where the words were, "I give to my wife my freehold *estate* called P. during her life. Item, all the above bequeathed *lands*, goods, and chattels after the death of my wife I give to my children share and share alike." The children were held to take for life only, the word "estate" not occurring in the gift to them. So, in *Doe* d. *Gwillim* v. *Gwillim*, 3 Nev. & M. 247, the introductory words "as touching all my worldly estate I give and dispose of the same as follows," followed by a gift of all his *estates* and chattels to his wife for life; "but demeatly to go to my children as I have appointed and disposed to them in lots and in money," were held not to enlarge a subsequent indefinite gift of particular lands to one of the children. In *Doe* d. *Knott* v. *Lawton*, 4 Bing. N. C. 455, 6 Scott, 303, where the gift was, "I give to my sons Joshua and James my estates that I now occupy, with the factory, &c., except the house I now occupy, with the cottages thereon, and five yards for a passage, &c., which I give to my daughters Martha and Alice jointly," the daughters were held to take the fee, but this was expressly on the ground that the prior gift to the sons would have carried the fee to them, but for the exception, and that that must necessarily give to the daughters what was taken from the sons. In the argument in that case some stress was laid on a subsequent reference in the will to the "estates" previously given to the sons; but the Court took no notice of that reference, which, of course, received its construction from, instead of putting a construction upon, the gifts referred to. (See *Doe* d. *Burton* v. *White*, 1 Exch. Rep. 526, infra.) In *Esdaile* v. *Gall*, 1 Russ. & M. 540; *Gall* v. *Esdaile*, *S. C.*, 8 Bing. 223, 1 Moo. & Sc. 466, where the word "estate" was mixed up with the words of gift, the Master of the Rolls and the Court of Common Pleas differed as to the construction.

Doe v. *Clarke.* Word *estate* held not to pass the fee.

Doe v. *Gwillim.* Word *estate* in introductory words of will did not pass the fee.

[In *Doe* d. *Bate* v. *Clayton*, 8 East, 141, where the testator devised to his daughter 20*l.* a year out of the profits of his land or estate at Eaton, and then devised to his grandson B. his messuage, &c., at Eaton, and declared his further will to be, that B., when he attained twenty-one, should enter upon and enjoy the above-mentioned estate; "but if B. should run away from his profession, all his right,

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title, and claim to the *estate* of lands and houses devised to him should devolve to his brother M." It was held, that the word "estate" was not so used as to pass the fee, although on other grounds the fee was held to pass. Lord Ellenborough, C. J., said, "Though the word 'estate' be used, which, in most cases, will carry the whole interest which a testator has got, yet, as it is in this case restricted to the antecedent words of devise, it cannot pass a fee, as those antecedent words will not do so." In other words, the word "estate," when it has no antecedent, means (not necessarily the fee-simple, but) the testator's whole estate whatever that may be; (*Doe* d. *Knott* v. *Lawton*, 6 Scott, 319); but where it has an antecedent, where it refers to a prior gift or a prior description, it means no more than what is included in such prior gift or description. Thus in *Doe* d. *Burton* v. *White*, 1 Exch. 526, where, after several devises of different properties, some indefinite, some expressly for life, and some sufficient to pass the fee, (though that does not clearly appear by the report), the testator said, "and I give and bequeath and order the rents or interest that is behind, due, and unpaid, shall go and be paid to that person I have left the estates and properties respectively to:" it was held, that the word "estates" so used did not enlarge the operation of the indefinite gifts; and the Court relied on the distinction pointed out by Gibbs, C. J., and Heath, J., in *Randall* v. *Tuchin*, 6 Taunt. 410.]

[So, although it is clear that a devise of "all *my* moiety," or "all *my* share," in certain lands will pass the fee, (*Doe* d. *Atkinson* v. *Fawcett*, 3 C. B. 274), yet, in *Pettywood* v. *Cook*, Cro. El. 53, where the testator, being seised of three houses, devised one of them to each of his three children and their heirs, and if any of them died without issue, then the survivors should enjoy "totam illam partem" equally divided between them: the Court held, that the words referred to the messuage and not to the testator's interest.]

Result of the cases.

[The result of the cases, therefore, seems to be, that the word "estate" in a will made before 1838 will never pass a fee, unless it occurs or is adopted by reference in the very body of the devise; and that even then it will not pass the fee, unless it is used possessively as referring to the testator's estate.]

[See this subject more fully developed, 2 Jarm. Wills, 179, where a whole section is devoted to it.]

Charge of a gross sum on the devisee.

Secondly. Where a devisee, whose estate was undefined, was directed to pay the testator's debts or legacies, or a specific sum in gross, he took an estate in fee, because he might otherwise have been damnified by the estate passing from him before he was reimbursed the sum expended; and the strong improbability of loss from

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the disparity in the amount of the sum charged relatively to the value of the land did not negative the implication: *Moone* v. *Heaseman*, Willes, 140; *Doe* v. *Holmes*, 8 T. R. 1; *Goodtitle* v. *Maddern*, 4 East, 496. Nor, for the same reason, did the futurity or contingent nature of the charge, though the contrary has been sometimes advanced: *Merson* v. *Blackmore*, 2 Atk. 341; *Doe* v. *Allen*, 8 T. R. 497. In the cases of *Abrams* v. *Winshup*, 3 Russ. 350, and *Doe* v. *Phillips*, 3 Barn. & Ad. 753, the charge was in effect contingent, (being liable to failure in the event of the devisee's dying before majority), though not in terms, and no attempt was made to found a distinction on this circumstance. Indeed, as the *possibility* of loss, which was the ground of the enlargement of the estate, evidently applies as well in the instance of a contingent as in that of an absolute charge, any such attempt, it is conceived, must have failed.

As to *contingent* charges.

So, it was wholly immaterial whether the direction to the devisee was simply to pay, or to pay *out of the land*: *Doe* v. *Snelling*, 5 East, 87.

As to devisee being also executor.

Where the devisee, who was directed to pay the testator's debts, was also appointed executor, the injunction was considered not to have relation to the duty, incidental to an executorship, of discharging the debts, but to have been imposed on him in the character of devisee of the land, in which, therefore, he took a fee: *Dolton* v. *Hewen*, 6 Madd. 9; also *Doe* v. *Phillips*, 3 Barn. & Ad. 753.

No enlargement of *express* estates.

The rule under consideration, however, was confined to *indefinite* devises; for, where the direction to pay was imposed on a person taking an *express* estate for life; (*Goodtitle* v. *Edmonds*, 7 T. R. 635; see also *Willes* v. *Lucas*, 1 P. W. 474); or an estate tail, whether express or arising constructively by implication from words introducing the devise over; (*Denn* v. *Slater*, 5 T. R. 535; *Doe* v. *Owens*, 1 Barn. & Ad. 318); it was wholly inoperative to enlarge such estate.

Distinction where the charge is upon the land.

It is well settled, that the mere imposition of a burthen on the land (no mention being made of the person by whom it is to be borne) had not the effect of enlarging the estates of any of the devisees; as in the instance of a devise to A. after debts and legacies were paid, or subject to or charged with the payment of debts and legacies, which clearly conferred only an estate for life: *Denn* v. *Moor*, 5 T. R. 558; *S. C.*, in Dom. Proc., 1 Bos. & Pull. 247. See also *Fairfax* v. *Heron*, Pre. Ch. 67. And though, undoubtedly, two cases may be adduced, (*Doe* v. *Richards*, 3 T. R. 356; *Gully* v. *Bishop of Exeter*, 12 Moore, 591), in which devises seeming to belong to this class were held to carry the fee, yet the former professedly re-

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cognised, while it evidently departed from (*a*), the principle which distinguished between charges on the land merely, and on the devisee in respect of the land; and, in the latter case, the Lord Chief Justice (Best) broadly laid it down, that every charge on the land without distinction converted an indefinite devise into a gift of the fee—a position which is so completely at variance with prior adjudications, that its advancement in the case cannot but deprive it of all authoritative weight. It is satisfactory to be able to oppose to this incongruous decision a subsequent one conforming exactly to the rule before stated: *Doe* d. *Clarke* v. *Clarke*, 1 Cr. & Mee. 39.

—As to annual charges.

The same general doctrine applied to *annual* charges, which, if made payable by the devisee of an undefined estate, enlarged that estate to a fee, whether the will directed the annual sum to be paid by the devisee simply, or by the devisee *out of the land: Spicer* v. *Spicer*, Cro. Jac. 527; *Baddeley* v. *Leapingwell*, 3 Burr. 1533; *Jenkins* v. *Jenkins*, Willes, 650; *Goodright* v. *Stocker*, 5 T. R. 93; *Right* v. *Compton*, 9 East, 265, overruling *Ansley* v. *Chapman*, Cro. Car. 157. And it seems to have been immaterial that the current income of the property exceeded the annual sum charged, unless the incumbrance ceased with the estate of the devisee; because, leaving out of consideration possible fluctuations in value, the devisee might, notwithstanding such excess, have been damnified, if the annuity happened to endure beyond his life estate. Where the annuity and the estate of the devisee were both indefinite, an alternative presented itself either to restrain the annuity to the life of the devisee of the land, or enlarge the estate of the devisee of the land to a fee; and the latter course was chosen as best subserving the intention. Where there was a devise to a person expressly for life, he paying an annuity to another also expressly for life, the direction to pay the annuity was inoperative (as we have seen the charge of a gross sum to be under similar circumstances) to enlarge the devisee's estate; and in such a case it seems that the annuity continued a burthen on the land during the life of the annuitant, even after the determination of the estate of the devisee, who was, in the first instance, made the vehicle of payment: *Willis* v. *Lucas*, 1 P. W. 474.

In consistency with the principle applicable to charges of gross sums, the imposition of an annuity on the lands, in terms which did not make the payment of it the personal duty of any devisee, left the estates created by the will wholly unenlarged and unaffected; (see *Doe* v. *Clayton*, 8 East, 141); which doctrine is so well settled

(*a*) But see 1 Cr. & Mee. 41.

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that the difficulty of reconciling every decision (see *Andrew* v. *Southhouse*, 5 T. R. 291) induces no hesitation in acceding to it.

Enlargement to a fee by the effect of a devise over.

Thirdly. Another ground for holding an implied fee to pass by an indefinite devise, is, its being succeeded by a gift over in the event of the devisee dying under the age of twenty-one years; such devise over being considered to denote that the prior devisee was to take, or rather to retain, the fee in the alternative event of his attaining the age in question; since, in any other supposition, the contingency on which the ulterior devise was made dependent would be very absurd: *Doe* v. *Cundall*, 9 East, 600; *Marshall* v. *Hill*, 2 Mau. & Selw. 608; *Doe* v. *Coleman*, 6 Price, 179; overruling *Fowler* v. *Blackwell*, 1 Com. 353. The force of this reasoning is somewhat diminished [?] where the devise over confers an estate for life only; but the rule clearly applied to such cases, (see *Frogmorton* v. *Holiday*, 3 Burr. 1618); as it also did where the death of the prior devisee was to be under any other age than majority; (see *Doe* v. *Coleman*, 6 Price, 179); and it was not restrained (as it has been sometimes laid down) to devises to children; (Ib.); nor, lastly, to cases in which death under the prescribed age was the only event on which the estate was given over. For instance, an indefinite devise would have been enlarged to a fee, by the effect of a devise over, to take effect on the prior devisee dying under age, *and without leaving lawful issue*: *Toovey* v. *Bassett*, 10 East, 460.

In fact, the implication might plausibly have been contended for, even where the contingency with which death was associated did not relate to the age of the devisee, as in the instance of a devise to A., and, if he dies in the lifetime of B., then to B. in fee. See *Moone* v. *Heaseman*, Willes, 138. However this may be, authority forbids the extension of the doctrine to cases in which the devise over in fee arose on a collateral event, wholly unconnected with the decease of the prior devisee; for, where lands were devised to the testator's wife for life, with remainder to A. and B., as tenants in common; and the testator provided, that, in case C. should disturb his said wife in the enjoyment of the premises, the same should go to D. in fee; it was held, that A. and B. took estates for life only: *Roe* v. *Blackett*, Cowp. 235. [To such a case, the reasoning on which the rule is founded does not extend; for though a gift to B. in the event of A.'s dying under contingent circumstances with which B. has no concern, is absurd when A.'s interest must determine by his death under any circumstances, there is no absurdity in giving the property over in an event wholly unconnected with A.'s life. And where the contingency with which death is associated is personal to the object of

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the ulterior gift, (as in the instance given above of A.'s death *in the lifetime of B.*), there the terms of the gift over are not necessarily unconnected with an intention that A. shall in no event take more than a life interest; and the case would be still weaker in A.'s favour, if the gift to B. were only for life.]

It is also abundantly clear, that where an indefinite devise was limited in defeazance of, or in substitution for, a previous devise in fee, (being the converse of the cases just mentioned), no enlargement of estate takes place. Thus, if lands are devised to A. and his heirs, and, in the event of his dying under twenty-one and without issue, to B., B. will take an estate for life only: *Middleton* v. *Swain*, Skinn. 339; *Beviston* v. *Hussey*, Skinn. 385; *Fairfax* v. *Heron*, Pre. Ch. 67; *Doe* v. *Holmes*, 2 Wils. 80 (*a*). Indeed, the seeming absurdity that a testator should defeat an estate in fee, for the purpose of substituting an estate for life, (which would be the ground of the argument for expanding the latter to a fee in such case), is wholly avoided by holding the prior devise to be defeated pro tanto only, which appears to be the sound construction. [But in *Doe* v. *Lawton*, 6 Scott, 303, (ante, p. 387), where a house was excepted out of a devise to A. in fee, and given to B. and C. without words of limitation, it was held, that the fee passed to them.]

Trustees take a fee, when.

Fourthly. The remaining class of indefinite devises conferring a fee consists of those in which a trust was created requiring that the devisee should take the inheritance. The doctrine which assigned to devisees in trust an estate exactly commensurate with the exigencies of the trust had long been familiar, but was often perplexing in its application on account of the difficulty of pronouncing what is precisely the quantity or measure of estate which the purposes of the trust required. See *Morrant* v. *Gough*, 7 Barn. & Cr. 206. The notice of a few points, by way of example, is all that can be attempted. If the trustees were to convey, of course they took the fee; *Doe* v. *Field*, 2 Barn. & Ad. 564; and a trust to sell vested in them an estate equally extensive; *Murthwaite* v. *Jenkinson*, 2 Barn. & Cr. 357; but a mere charge of debts and legacies did not constructively give them an estate: *Kenrick* v. *Lord Beauclerk*, 3 Bos. & Pull. 178. An unrestricted power of leasing afforded a strong argument for vesting the fee in the trustees; *Doe* v. *Walbank*, 2 Barn. & Ad. 554; and so, it seems, did the circumstance of leaseholds (the legal estate in which was given to and necessarily remained in the

(*a*) As to the substituted devise for life defeating the prior fee pro tanto, vide ante, p. 296.

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trustees,) being combined with the freehold in the devise: *Houston* v. *Hughes*, 6 Barn. & Cr. 403.

Trust to *pay* rents, &c., how construed.

An established distinction was, that a direction to trustees to *pay* the rents to the person who was beneficially to receive them, vested in the trustees the legal ownership; *Robinson* v. *Grey*, 9 East, 1; but a trust *to permit and suffer* him to receive the rents had no such effect: *Right* v. *Smith*, 12 East, 455; *Gregory* v. *Henderson*, 4 Taunt. 772. Where both expressions were used, the latter prevailed (*a*); hence the words "to pay *or permit or suffer*" carried the estate to the beneficial devisee: *Doe* v. *Biggs*, 2 Taunt. 109. Where, in addition to the direction to permit and suffer the rents to be received, the testator expressed another purpose, requiring that the trustee should retain the estate, as the preservation of contingent remainders, the property remained in him as it would have done if such purpose had stood alone: *Biscoe* v. *Perkins*, 1 Ves. & B. 485.

Estate of trustees restricted to infancy or coverture.

It should seem, that, in general, where lands were devised to trustees, or even to them and their heirs, in trust to apply the rents for the benefit of a minor until his age of twenty-one years, and then in trust for him in fee; or where the devise was in trust for the separate use of a female for life, and, after her decease, in trust simply for the ulterior objects of the testator's bounty, the estate of the trustees was limited to and terminated with the minority or coverture (actual or possible), for the protection of which the trust estate was evidently created: *Nash* v. *Coates*, 3 Barn. & Ad. 839.

Limitation *to the use* of the trustees.

Of course, a testator might, if he thought proper, vest the estate in his trustees without assigning to them any duty to perform, and such would unquestionably be the effect of a devise to the *use* of the trustees in trust for the beneficial objects: *Symson* v. *Turner*, 1 Eq. Ca. Ab. 303, pl. 1, n.; *Harris* v. *Pugh*, 12 Moore, 577; also *Doe* v. *Field*, 2 B. & Ad. 564. But even a limitation to the *use* of the trustees would, it seems, if the extent or quantity of their estate was not expressly defined, have admitted of being enlarged or restricted by the nature of the trust: *Venables* v. *Morris*, 7 T. R. 342, 437; *Curtis* v. *Price*, 12 Ves. 89; and see *Hawkins* v. *Luscombe*, 2 Swanst. 375. [To the subject of the estates of trustees the 34th chapter of Mr. Jarman's Treatise on Wills is devoted, (2 Jarm. Wills, 196 et seq.), where the reader will find the long catalogue of decisions respecting the quality and extent of the estate conferred by devises in trust, stated and commented on.]

Stat. 7 Will. 4

["Of all the adjudged points," observes Mr. Jarman, (2 Treat.

(*a*) As to this principle, vide ante, p. 269.

on Wills, 228), "connected with the subject, that which has been deemed the least satisfactory is the doctrine of those decisions which, in certain cases, gave to trustees, whose estate was undefined, a term of years (either with or without a prior estate for life), determinable when the purposes of the trust should be satisfied. To exclude the application of this inconvenient and very refined rule of construction, two enactments have been introduced into the statute of 7 Will 4 & 1 Vict. c. 26. The 30th section provides, 'That where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.' "]

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& 1 Vict. c. 26, ss. 30, 31.

[Section 31 provides, "That, where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

Estates of trustees, if not expressly limited, to be either freehold or in fee.

"These clauses," continues Mr. Jarman, "have been the subject of much criticism. (See H. Sugd. Wills, 127; Sweet on Wills Act, 154). It is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of the 30th section would seem to be simply to negative the construction which, in certain cases, gave to a trustee an undefined term of years, for it allows him to take an estate of freehold, or a *definite* term of years, either expressly or by implication; but the 31st section takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators,) for purposes

Mr. Jarman's remarks upon stat. 7 Will. 4 & 1 Vict. c. 26, ss. 30, 31.

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requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or, being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in *Carter* v. *Barnardiston*, an estate for years, or, as in *Doe* v. *Simpson*, an estate for life, with a superadded term for years, but) an estate in fee-simple. The result, in short, is, that trustees, whose estate is not expressly defined by the will, must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee. It is observable that this section allows the trustees to take an estate of freehold, not whenever the purposes of the trust require such an estate, but only in the specified case of the "surplus rents and profits being given to a person for life," making no provision, therefore, for the case (a possible, though not a frequently occurring one,) of a trust of any other kind being created for a purpose co-extensive with life; for instance, a trust to keep on foot a policy of life insurance. Possibly it would be held, that such a case is excluded from the 31st section by the exception in the 30th section, and thus some effect would be given to this otherwise apparently idle clause of the statute; farther than this (even if so far), it is presumed, the exceptive part of the 30th section could not be construed to qualify or control the operation of the 31st section; but decision alone can settle the point.

Points not excluded by the act.

["The enactments in question do not, beyond the particular cases which have been pointed out, interfere with the general doctrines of construction discussed in the present chapter. Even under wills made or republished since the year 1837, it may still be questionable whether trustees take *any* estate, or only a power; also, whether they take an estate limited to the lives of the tenants for life of the beneficial interest, or an estate in fee-simple; and, consequently, there should be no relaxation in the anxious care of framers of wills to preclude ambiguity in this particular. It cannot, however, according to the suggested construction of the 31st section, under *such* wills become a question, whether trustees take an estate in fee, or a chattel interest, in order to raise money, or for any other purpose.

["The new doctrine would not, it is conceived, preclude the construction that trustees take an estate pur autre vie, with a power of sale over the inheritance. The writer is not aware, however, of any adjudged instance of such a construction; for where an estate is devised to trustees indefinitely, the authorities (with one solitary exception, see *Hawker* v. *Hawker*, 3 Barn. & Ald. 537, in which there seems to have been an opposing context,) conduct to the conclusion,

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that whatever duty is subsequently imposed on them, must be in virtue of their estate, the quality and duration of which are to be measured accordingly. The point, of course, depends on the conclusion to be fairly drawn from the entire will."]

Absolute interest in leaseholds passes, when.

The doctrine which required words of limitation, or some corresponding or equivalent demonstration of intent, in order to vest in the devisee the testator's whole estate or interest, did not apply to leaseholds for years, which, however long, absolutely and entirely passed under a simple gift of messuages, or other such descriptive appellation. Thus, if a man, who is possessed of a term of 1000 years in Whiteacre, devises, or rather bequeaths in these words:—"I give Whiteacre to A.," the entire term will (the executors' assent being obtained) pass to the legatee, and positive intention must be evinced in order to give to the bequest a more restricted operation. [And this, of course, is now the rule with respect to wills made since 1837.]

Devise to trustees in fee in trust for A., without words of limitation, gives the fee to A., the cestui que trust.

[It is now settled, that where lands were devised to trustees in fee in trust for a person, without any words of limitation of the estate to that person, the cestui que trust took the beneficial interest in fee. This was decided by Lord Cottenham, in the recent case of *Moore* v. *Cleghorn*, 12 Jur. 591, in which the cases of *Challenger* v. *Sheppard*, 8 T. R. 597, and *Knight* v. *Selby*, 3 Man. & G. 92, 3 Scott, N. R. 409, were commented upon and followed. His Lordship observed: "The testator in this case begins his will by directing that his debts shall be paid, but he does not refer to any particular fund for doing this: he then gives certain portions of land to trustees for the use and benefit of his natural boys, describing them; the rents, issues, and profits to be paid for the maintenance and education of these children, or the survivor or survivors of them, share and share alike. Now, two out of the three being dead, the heir-at-law comes here, claiming a resulting trust of two-thirds, saying, that the shares of the children dying were undisposed of. The survivor, however, says, that a fee-simple interest was given by the will, and that, under any circumstances, the heir has no claim. In the view which I take of the case, the observations of the Master of the Rolls as to the taking of the boys inter se are not material. It is fortunate when the rules of the Court enable the intention of a testator to be carried into effect. It is quite clear here that he intended his boys to take all which he gave to the trustees. Another reason for the gift of the fee to the trustees has, however, been alleged, namely, for the payment of debts, but it nowhere appears that the testator contemplated his debts being paid out of his real estate; the expressions he uses lead to an opposite conclusion. The other parts of the will are

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unimportant as to the heir-at-law, where the testator gives a previous estate for life; but it appears that when he does so, he does so carefully. The case comes then nakedly to the question, where a testator gives to trustees an estate in fee for the use of others, whether those others do not take an estate in fee. If I had to decide the point in the absence of authority, I should have little difficulty in finding out what the testator meant; but I am not obliged to do this, for I entertain no doubt that the point was decided in *Challenger* v. *Sheppard*, and that the decision was confirmed and acted upon in *Knight* v. *Selby*. Marginal notes are not always to be trusted, but they become important in cases where no reasons for the judgment are assigned, as in *Challenger* v. *Sheppard*. The learned reporter, in the marginal note to that case, says: 'Where an estate in fee is devised to trustees, in trust for A. B., without any limitation of the estate to the cestui que trust, the latter takes the beneficial interest in fee.' Serjeant Best argues, on one side, that the devisee took an estate in fee in the premises devised by the testator's will. Gibbs argues, on the other side, that the devisee took only an estate for life, because no words of inheritance were added to the devise to him; that the argument of the plaintiff, that the beneficial interest that the devisee takes is co-extensive with the legal interest devised to the trustees, was untenable, because it tends to shew that in all cases where an estate is given to trustees and their heirs in trust, the cestui que trust must take a fee. All this proves that the point now in question was raised and discussed. Of course, where anything in the will shews that it is not the intention of the testator that the party is to take the whole beneficial interest, the rule does not apply; but what can be clearer than the intention in favour of the devisee in the present instance, where the gift is 'for the use and benefit' of the cestui que trust? The argument, then, in *Challenger* v. *Sheppard* shews what the point decided really was, and that it was as stated in the marginal note. But it is not necessary to rest on this, for in *Knight* v. *Selby* the case came on again, and *Challenger* v. *Sheppard* was cited; and Chief Justice Tindal says, 'This case cannot be distinguished from that of *Challenger* v. *Sheppard*, 8 T. R. 597, where it was held, that where an estate in fee is devised to trustees in trust for A. B., without any limitation of the estate to the cestui que trust, the latter takes the beneficial interest in fee,' these being the very words of the marginal note in *Challenger* v. *Sheppard*. Thus, then, the Judges have that case cited, concur in the decision, and act upon it. No rule can be, therefore, better established than this is. It cannot be contended that the same question does not arise in the present case."]

DEVISES ENLARGED TO A FEE BY IMPLICATION.

[By the 28th section of the statute 7 Will. 4 & 1 Vict. c. 26, it is enacted, "That, where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." As formerly nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context; so now it will be observed that by this clause an estate in fee will pass by such a devise, *unless a contrary intention shall appear by the will.*]

By the stat. 7 Will. 4 & 1 Vict. c. 26, a devise without words of limitation to pass the fee.

[As to the question whether the whole interest in an estate pur autre vie passes without words of limitation, vide ante, Vol. 2, p. 14. In *Doe* d. *Lewis* v. *Lewis*, 9 Mee. & W. 662, an estate pur autre vie limited to the testator, his heirs and assigns, was devised to W. J. L. and his assigns during the residue of the term; and it was held, that, on the devisee's death, it passed to his executors.]

Estates pur autre vie.

XX. What passes under the words "household furniture," "goods and chattels," "household effects," &c.

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It is of no inconsiderable importance to choose the most appropriate words for describing those articles of personalty, which are often bequeathed separately from the general estate, such as household furniture, &c., since many questions arise on such bequests; though, as they relate to matters of small value, comparatively few of them become subjects of judicial consideration. To this probably we must ascribe the fact, that less attention has been paid to the framing of such gifts than to many other clauses of rarer occurrence.

As to bequests of household furniture, &c.

Bequests of this kind are divisible into two classes, viz. those in which the articles in question are described with reference to locality, and those in which they are not so described. In the former class of cases, the utmost generality of description will commonly best answer the intention; for, where a testator bequeaths all his effects which shall be in and about his dwelling-house at the time of his decease, he usually means that every thing found there at the prescribed period shall pass to the legatee. [As to what words amount to a reference to locality, see *Norris* v. *Norris*, 2 Coll. 719.]

[In the case of *Willis* v. *Curtois*, 1 Beav. 189, a testator, having

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three establishments, at A., B., and C., bequeathed the one at A. to his nephew; and all his carriages, horses, implements, and his live and dead stock and chattels, in and about the premises at A., and also his household goods and furniture, pictures, plate, linen, china, liquors of all sorts, and brewing vessels, and likewise his watches and personal ornaments; and he also gave to his said nephew all his books in his house at B.; he gave the premises at B. to trustees for sale. Lord Langdale, M. R., held, that the household goods, furniture, &c. at B. and C. passed by the bequest. In the same case, MS. notes of a physician, of his attendance on a patient, and which were bound up in volumes, were held to pass under a bequest of "all and every my books in and about my house" at A.]

And even where part is intended to be excepted, if such exception embraces only a single class or a few classes of articles, it is better to describe the subject of the bequest by some general word, such as "effects," or "property," and introduce an exception descriptive of such articles, than to attempt an enumeration of the various classes of articles which the bequest is meant to comprise.

Whether money and securities for money will pass as goods and chattels in a house.

A testator seldom intends, under the bequests in question, to include money and securities for money, which therefore should be expressly excluded, especially the former; as it should seem, according to the cases, that money (including in this denomination bank and other notes payable to bearer on demand) *will*, and securities for money *will not*, pass under a bequest of goods and chattels in and about a particular house, the latter being merely the evidence of title to things out of the house and not things in it: *Chapman* v. *Hart*, 1 Ves. sen. 271; *Popham* v. *Lord Aylesbury*, Amb. 68. As to which see 11 Ves. 662; *Green* v. *Symonds*, 1 B. C. C. 129, n.; *Moore* v. *Moore*, 1 B. C. C. 127; *Jones* v. *Sefton*, 4 Ves. 166; [*Brooke* v. *Turner*, 7 Sim. 671; *Wrench* v. *Sutting*, 3 Beav. 521; *Hertford* v. *Lowther*, 7 Beav. 1.]

And though debts secured by bond or other instrument under seal are considered as locally situate in the diocese where the securities are found, for the purpose of fixing the jurisdiction of the Ecclesiastical Court; yet, in regard to the point under consideration, they are undistinguishable from other choses en action, and therefore will not pass as goods and chattels in a house or other designated place: *Moore* v. *Moore*, 1 B. C. C. 127. [See *Brooke* v. *Turner*, 7 Sim. 761.]

In applying the rule, that money will pass under a bequest of goods and chattels, we must not lose sight of the doctrine which teaches that such general words may be restrained by more limited

terms with which they are associated; and the circumstance that the legatee has a money legacy has been considered to favour the restrictive construction: *Roberts* v. *Kuffin*, 2 Atk. 112. [As to the application of the rule "noscitur a sociis" to questions of this nature, see also *Cavendish* v. *Cavendish*, 1 B. C. C. 467; *Michell* v. *Michell*, 5 Madd. 69; *Arnold* v. *Arnold*, 2 Myl. & K. 315; *Attorney-General* v. *Harley*, 5 Russ. 173; *Lamphier* v. *Despard*, 2 Dru. & W. 59; *Ferguson* v. *Ogilby*, 2 Dru. & W. 548; *Montresor* v. *Montresor*, 1 Coll. 693; *Parker* v. *Marchant*, 1 You. & C. C. C. 290, 1 Phill. 356.]

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Another point often raised in construing bequests of chattels in and about a house, relates to the period at which they must answer to the described locality. The rule seems to be, to consider the death of the testator as such period, unless the contrary appears. And, therefore, where a testator devised his house in Jermyn Street, and all his goods and furniture therein, to his lady, for life, except the pictures, which he gave to J. and E.: Lord Keeper Wright held, that the exception (which was considered to comprise as well pictures in boxes as those hung up as furniture) extended to pictures brought into the house after the will was made: *Gayre* v. *Gayre*, 2 Vern. 538. So, where a testator gave to his wife all his personal estate at a place called W., it was held that the words passed whatever personalty the testator had there at the time of his death: *Sayer* v. *Sayer*, 2 Vern. 688. So, a bequest of "my library of books now in the custody of Mr. C.," was held to comprise all the books in the library at the testator's decease, the word "now" not restricting the bequest to the books of which the library was composed at the making of the will, but denoting merely where the library then was. It was compared to a bequest of a flock of sheep *now on such a hill*, which it was said would pass the sheep produced after the making of the will, *it being the case of a collective body*: *Allsouls* v. *Codrington*, 1 P. W. 597. But if the testator has introduced into his description restrictive expressions pointing at present or past time, it is clear that prospective acquisitions are excluded; and therefore where a testatrix bequeathed all the goods she *brought* into the house, it was held that no goods passed except what were in the house at the making of the will: *Dormer* v. *Bishop Burnet*, cit. Amb. 281. And if, from the nature of the case, it is evident that the testator refers to the locality, for the purpose of designating specific chattels then in his contemplation, and not with the view of requiring them to answer to the description at any future period, the construction will be made accordingly. As where the

At what period effects must answer to a described locality.

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captain of a ship bequeaths all his goods and chattels on board a particular ship, it is obvious that he cannot mean goods answering to this description at his death, when he may have no interest in the ship, but that he intends to designate such goods as are then belonging to him, whatever may be their future local situation: *Chapman* v. *Hart*, 1 Ves. sen. 271.

It seems that a legacy of goods in or about a particular house will not carry articles of furniture selected and packed for removal to the house by the testator's order, but not actually removed thither at the time of his decease (*Duke of Beaufort* v. *Lord Dundonald*, 2 Vern. 739 (*a*)); or furniture purchased by him, but not sent home (*Grandison* v. *Pitt*, 2 Vern. 740, n., ed. by Raithby); nor will it comprise goods removed to another house in the testator's lifetime, if such change of locality continues up to the period of his decease: *Heseltine* v. *Heseltine*, 3 Madd. 276. [See *Lord Brook* v. *Earl of Warwick*, 12 Jur. 912, post, p. 404.] To avoid this consequence, and provide against the contingency of the testator's change of residence, bequests of this nature should be made to comprise the testator's effects which may be in or about *any* house or houses he may happen to occupy at his decease. It is also convenient to extend such a bequest to articles removed from the house for any temporary purpose.

In some of the cases, a distinction is hinted at between the effect of necessary and unnecessary removal; but it is unlikely that at the present day the Courts would embarrass themselves with attempting to apply so subtle a distinction. Indeed the case of *Earl of Shaftesbury* v. *Countess of Shaftesbury*, 2 Vern. 747, seems to be a decisive authority against it; for a bequest by a testator of the goods that should be in his house at R. at his decease, was there held to be defeated by the removal (evidently a necessary one) of the goods from R., on the occasion of the steward, in the absence but with the privity of the testator, giving up the house to the landlord. It was said, that the case would have been otherwise, if the removal had been made by fraud or on purpose to disappoint the legacy, or by a tortious act unknown to the testator.

As to bequests of chattels not restricted to a given locality.

In the second class of bequests before referred to, viz. those in which household furniture or other such articles are described without reference to locality, general terms of course are to be used with caution, as otherwise the bequest will extend to the whole personal estate (*b*) (see *Kendall* v. *Kendall*, 4 Russ. 360), and the claim of the legatee be brought into competition with that of the general re-

(*a*) But, as to this case, vide 3 Atk. 202.

(*b*) [As to this, see 1 Jarm. Wills, 692 et seq.]

siduary legatee, thereby creating one of those perplexing questions in which the Courts have to determine how far general words of description are restricted by the more limited terms with which they stand associated: 3 P. W. 112, 2 Atk. 103, 13 Ves. 311, 13 Ves. 39, 1 Russ. 146. And care should also be taken not to introduce into the bequest an exception of any articles which such bequest would not otherwise comprise, the effect of which necessarily is, to drive the expositor of the will to the alternative of supposing the testator to have meant that the bequest shall receive such a construction as would have extended it to the excepted articles if they had not been expressly excluded, or to have made an unnecessary and incongruous exception. Thus, a bequest of plate, linen, household goods, and other effects (money excepted), has been held to carry stock in the funds, though it is clear that, without the exception, stock would not have passed under the bequest: *Hotham* v. *Sutton*, 15 Ves. 319. [Where general words are followed by words descriptive of a particular species of property, the effect is to confine the general words to things of the nature specified. See *Timewell* v. *Perkins*, 2 Atk. 103; *Trafford* v. *Berrige*, 1 Eq. Ca. Ab. 201, pl. 14.]

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With respect to the extent of particular expressions, it may be observed, that the terms "household goods," or "household furniture," (which seem to be synonymous), will include household linen, (5 Russ. 319); china, (*Hele* v. *Gilbert*, 2 Ves. sen. 430), both useful and ornamental; pictures hung up in frames, (*Cremorne* v. *Antrobus*, 5 Russ. 319); and, in ordinary cases, even plate (*Nicholls* v. *Osborn*, 2 P. W. by Cox, 419, n.; *Kelly* v. *Powlet*, Amb. 607 (*a*); *Stapleton* v. *Conway*, 1 Ves. sen., Belt's Supplement, 187; *Cremorne* v. *Antrobus*, 5 Russ. 319); and fire-arms, where used for domestic defence, (see 1 Sim. & Stu. 189); [tenant's fixtures in a leasehold house, (*Paton* v. *Shepherd*, 10 Sim. 186)]; but not books, (*Kelly* v. *Powlet*, Amb. 607; *Bridgman* v. *Dove*, 3 Atk. 201; see *Porter* v.

"Household furniture" and "household goods," how construed.

(*a*) An excepted instance, suggested by the Master of the Rolls in the cited case, is that of a tradesman buying a service of plate as a bargain, and not for his domestic use, which probably would have been deemed an extravagant supposition in those days of plainness and simplicity. His Honor, however, disclaimed being understood to mean that the plate must be in actual use (as suggested by Lord Hardwicke in *Snelson* v. *Corbet*, 3 Atk. 370). This exception, indeed, seems to belong to that class of cases in which the gifts under consideration are held not to comprise articles purchased for the purposes of trade; for, it is clear, that a bequest of household furniture by a broker, or of plate by a goldsmith or silversmith, would not pass his general stock, but would be confined to such furniture or plate as the testator had appropriated for domestic use: *Pratt* v. *Jackson*, 2 P. W. 302; *Le Farrant* v. *Spencer*, 1 Ves. sen. 97.

As to articles purchased in way of trade.

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Tournay, 3 Ves. 314; [*Cornewall* v. *Cornewall*, 12 Sim. 298]); or globes or mathematical instruments, (*Kelly* v. *Powlet*, Pre. Ch. 207, n. [but see *Lord Brook* v. *Earl of Warwick*, 12 Jur. 912, infra, p. 403]); or, it seems, victuals and housekeeping stores, such as meat, beer, (*Slanning* v. *Style*, 3 P. W. 334, 2 Ves. sen. 280), wines (3 Ves. 314), and other articles whose use is in their consumption, of which therefore an additional mention is requisite, as a testator rarely intends things of this nature to fall into the residue, especially if it be made subject to a trust for sale. Such effects appear to be aptly described by the term "consumable stores," which will comprise some articles not included in the denomination of housekeeping provisions, such as hay, corn, &c. [As to gifts of consumable stores, see *Randall* v. *Russell*, 3 Meriv. 190; *Andrew* v. *Andrew*, 1 Coll. 690.]

"Household effects."

The term "household effects" is a more extensive, and therefore seems to be a better general term of description than "household goods" or "furniture." Thus, in the case of *Cole* v. *Fitzgerald*, 1 Sim. & Stu. 189, where a testator gave to E. C. his dwelling-house, garden, and premises at R. for her life, and also all and singular the household furniture *and other household effects of and belonging to him in the said dwelling-house and premises at the time of his decease;* the following articles were found in the dwelling-house and premises at the testator's death—four fowling-pieces, a pair of pistols, lathes and apparatus for turning, models of a cutter and mortar, several paintings in frames, about a hundred volumes of books in general circulation, an organ, a parrot and cage, a pony, a cow, a haystack, and a considerable stock of wines and liquors:—Sir J. Leach, V. C.—"The words 'household furniture and other household effects' will comprise all property in the house and on the premises intended for use and consumption therein, or for the ornament thereof. E. C. is therefore entitled to the pistols, to the apparatus for turning, to the models, paintings, organ, parrot (*a*), books, and wine and liquors; but not to the pony, cow, or fowling-pieces, unless it is proved that they were kept for the defence of the house. If the haystack was only for use, it would pass; if for sale, it would not pass." On appeal (3 Russ. 301), Lord Lyndhurst concurred in his Honor's decision: his Lordship observing—"It is clear that this testator, by adding to 'household furniture' 'other household effects,' meant to carry his bequest further than merely to household furniture. The only question is, how far the word 'effects' is controlled by the word 'household;' and though some doubt may be entertained with respect

(*a*) This seems to be a mistake: the parrot was held not to pass. Vide 3 Russ. 301, n.

to the wines and liquors, the books, and the turning machinery, I do not see any sufficient reason for excluding any of them from the bequest to E. C."

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If the word "effects" had not been restrained by association with "household," the bequest in question would clearly have comprised the pony and domestic animals, which were held (contrary, no doubt, to the testator's real intention) not to pass—though it is always to be remembered, that words in themselves the most extensive are susceptible of restriction from, and are often narrowed by, their juxtaposition with less comprehensive terms, being considered to point to articles ejusdem generis: *Boon* v. *Cornforth*, 2 Ves. sen. 280. [Vide ante, p. 399.]

In the case of *Gower* v. *Gower*, 2 Eden, 201, Lord Northington held, that even running horses passed under a clause in Earl Gower's will, by which he declared his desire that all his plate, furniture, household goods, and all books and other furniture of his library, and all stores and implements of all sorts and kinds, *and other goods and chattels whatsoever, which should be in and about his dwelling-house and outhouses at Trentham at his death*, and all other his plate and household linen, (except as therein excepted), should be preserved for, upon, and be held and enjoyed by such person or persons as should be entitled to the testator's estates in the counties of Stafford and Salop, by virtue of the limitations in his son's marriage settlement; Lord Northington observing, that the testator's intention was, that nothing about his seat at Trentham should be disturbed to the prejudice of the then Earl, but that every thing both of profit and amusement should pass.

Running horses held to pass under a bequest of goods and chattels.

[Several of the questions discussed above were raised in the recent case of *Lord Brook* v. *Earl of Warwick*, 12 Jur. 912, where the testator, by a will dated in 1841, after devising all his estates in the county of Surrey to certain uses, gave and bequeathed all his household furniture, wines, implements of household, household linen, pictures, prints, musical instruments, clothes, books, pictures, articles of vertù, fixtures, horses, carriages, dogs, live and dead stock, and implements of husbandry, which might be, at the time of his decease, in, upon, or about his mansion-house at Lower Gatton, or upon any part of his Surrey estates, (and which should not be by his will specifically bequeathed), to trustees, as heirlooms with the Surrey estates; and he gave and bequeathed all his family diamonds and other jewels, (not thereby or by any codicil specifically bequeathed), to trustees, in trust for his mother for life, with a limitation over; and he bequeathed to the holder of Burton House, in Lincolnshire, all his

Lord Brook v. *Earl of Warwick.*

Telescopes held to pass as "household furniture and implements of household."

Gift of furniture, &c., "which, at my decease, shall be in my house at G.:" held to pass furniture, &c., removed for the purpose of being repaired or cleaned.

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household furniture, wines, implements of household, household linen, books, clocks, pictures, prints, fixtures, and other effects, which, at the time of his decease, should be in or about the mansion-house at Burton, and all his gold and silver, family and other plate, and watches and seals, (not specifically bequeathed), to trustees, as heirlooms with Burton House. At the time of the testator's death, he had, at Gatton House, divers masonic orders, telescopes, and dressing cases, which were claimed by the devisees of the Surrey estates, but which the residuary legatee contended did not pass under any of the bequests as "articles of vertù," or otherwise. There were also, at the time of his death, various pictures, statues, trinkets, and other articles of vertù at Gatton House; and several pictures, removed from that house, were in the hands of a person in London, for the purpose of being cleaned, one in the hands of the same person, purchased from him, several pieces of furniture and silks, some books from Gatton House in the hands of the binder, and, at sea, several cases of marble, all of which were intended to be used in the decoration of Gatton House. Such of those articles as were not actually at Gatton were claimed by the residuary legatee. Sir J. L. Knight Bruce, V.C., held, that the telescopes at Gatton House passed under the bequest of "household furniture and implements of household;" though this seems to be contrary to *Kelly* v. *Powlet*, Pr. Ch. 207, n., ante, p. 402, and *Slanning* v. *Style*, 3 P. Wms. 334, where the same words were held not to pass fowling-pieces. Whether the application of the term "virtuoso" to natural philosophers, formerly so frequent, might not have sanctioned the extension of the expression "articles of vertù" to the telescopes, may be a question. It was also held, that the pictures sent to be cleaned, the books sent to be bound, and furniture sent to be repaired, passed with the furniture, &c., at Gatton. But that the articles which were only intended for, and had never been at Gatton, did not pass.]

Heirlooms, annexing personal to real estate, devised in strict settlement.

[As to the proper mode of limiting personal property, intended to go with real estate devised in strict settlement, so as to avoid the operation of the rule, that words which create an estate tail in real estate confer the absolute interest in personalty, see 2 Jarm. Wills, 507. See also the recent case of *Rowland* v. *Morgan*, 12 Jur. 348, where the cases on this subject will be found collected. In this case, Vice-Chancellor Wigram held that the gift of the chattels was a gift executed: consequently, the intention of the testator, that they should be held as heirlooms, was defeated.]

[A great number of cases connected with the subject of this division will be found in Roper on Legacies, ch. 4.]

XXI. Priority and order of payment and abatement of legacies.

PRIORITY OF PAYMENT OF LEGACIES.

Priority among legatees not conferred by certain expressions.

The ordinary expressions in a will, descriptive of the order of paying pecuniary legacies, are not considered to denote an intention to vary or disturb the equality, which, by the general rule of equity, obtains among legatees of any given class. This was shewn in some clear general propositions by Sir J. Leach, V. C., in the case of *Beeston* v. *Booth*, 4 Madd. 161—"The expressions 'In the first place I give to A., then to B.,' are not evidence of such intent (i. e. an intent to depart from the general rule); for they mark only the order in which it occurred to the testator to name the objects of his bounty. A gift to A. payable at one month after my decease, to B. at six months, and to C. at twelve months, are not evidence of such intent; for, although to be paid at different times, the presumed intention remains, that they are all equally to be paid at those times. The expressions 'In the first place I direct that my executors shall pay to A., then to B., then to C.,' are not evidence of such intent; for they mark only the order in which it occurs to the testator to give the directions to his executors. The expressions 'I direct that my executors shall in the first place pay to A., in the next place to B., then to C.,' are not evidence of such intent, because they do not necessarily import more than the order of payment: that A. shall be paid by my executors in the first place, or out of the first monies which they have applicable to the payment of legacies; B. in the next place, or next in order; and then, or next in order, C.; and these expressions are therefore consistent with the presumed intention, that all shall be equally paid in their order." See also *Vintner* v. *Pix*, 1 Ch. Rep. 133; *Brown* v. *Allen*, 1 Vern. 31; *Lewis* v. *Lewis*, 2 Ves. sen. 417; *Blower* v. *Morret*, Id. 420; [*Brown* v. *Brown*, 1 Keen, 275; *Thwaites* v. *Foreman*, 1 Coll. 409; *Johnson* v. *Child*, 4 Hare, 87. See the recent case of *Ashburnham* v. *Ashburnham*, 12 Jur. 299, where Sir L. Shadwell, V. C., held, that an annuity given by a testator to his brother towards his maintenance and support, was not charged on the real estate, and was not entitled to priority, but must abate pari passu with the other legacies. His Honor observed: "I see that in my copy of Maddock, I have made a remark to that case of *Beeston* v. *Booth*, that the testator thought there would be a residue; here the testator also contemplated a residue." And his Honor thence inferred, that the testator "never could have had a notion that, to secure the annuity, it should have priority."]

PRIORITY OF PAYMENT OF LEGACIES.

Legacies to servants, &c.

It has been also decided, that legacies to servants, *Attorney-General* v. *Robins*, 2 P. W. 25; *Alton* v. *Medlicott*, cit. 2 Ves. sen. 417; to executors, though given for their care and trouble, *Heron* v. *Heron*, 2 Atk. 171; or to friends for the purchase of mourning rings, *Apreece* v. *Apreece*, 1 Ves. & Bea. 364, (all which a testator would commonly wish to exempt from deduction); [to charities, *Tate* v. *Austen*, 1 P. Wms. 265; *Sturge* v. *Dimsdale*, 6 Beav. 462;] are equally within the general rule, and subject to abatement proportionally with other legacies; and annuitants cannot claim precedence over legatees of gross sums: *Hume* v. *Edwards*, 3 Atk. 693; [see *Innes* v. *Mitchell*, 1 Phill. 710; nor is the wife or child of the testator in a better situation than mere strangers in respect of priority: *Blower* v. *Morret*, 2 Ves. sen. 420.]

Legacies in consideration of legatee's relinquishing some benefit.

But where a legacy is something more than mere bounty (being founded on a valuable consideration moving from the legatee), as where it is given upon the condition of his renouncing some claim upon the testator's estate, the legatee is not liable to abate pari passu with those whose gifts flow only from the spontaneous bounty of the testator. On this principle, it has been often decided, that a widow, to whom a pecuniary legacy is bequeathed in lieu of dower, is entitled, on a deficiency of assets, to be paid in preference to other legatees of the same class; *Burridge* v. *Bradyl*, 1 P. W. 127; and this advantage extends to the entire legacy, although it may exceed, and however largely it may exceed, the value of the dower: *Davenhill* v. *Fletcher*, Amb. 244. [But it is not given where the testator leaves no real estate subject to dower: 5 Beav. 35. The Dower Act, 3 & 4 Will. 4, c. 105, has an express saving of this rule of equity (s. 12).] But the legatee must have a valid legal claim subsisting at the death; and accordingly, where a testator bequeathed to certain creditors, who had accepted from him a composition of ten shillings in the pound, sums equal to the residue of their debts, it was held that the sense of moral obligation, which had induced this act, did not confer on the legatees any superiority of claim over other voluntary claimants under the same will: *Coppin* v. *Coppin*, 2 P. W. 292. [See, however, *Williamson* v. *Naylor*, 3 You. & Coll. 208, where the circumstance, that the testator might have relied on the Statute of Limitations as a defence against the creditors' claims, was held not to bring them within the rule in *Coppin* v. *Coppin*.]

XXII. Destination of the personal (*a*) estate of persons dying intestate.

Statute 22 & 23 Car. 2, c. 10. Distribution of personal estate.

The distribution of the personal estate of intestates is, with some local exceptions presently noticed, regulated by the stat. 22 & 23 Car. 2, c. 10, which disposes of the surplus, after paying debts and funeral expenses, as follows: viz. one-third to the wife and two-thirds to the children, equally, or, such children being dead, to such persons as legally represent (*b*) them, "other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allowed to the other children to whom such distribution is to be made: And in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated; but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate." And in case there shall be no child nor any legal representatives of any child, then one moiety (*c*) to the wife, and the residue equally to the next of kindred (*d*) in equal degree, and those

(*a*) [The law of descent of real estate is discussed ante, Vol. 1, p. 124.]

(*b*) [In the Statute of Distributions, the term "legal representatives" means descendants; consequently the widow of a deceased son takes nothing: *Price* v. *Strange*, 6 Madd. 161.]

(*c*) [It has been held, that where an intestate leaves a widow but no next of kin, one moiety belongs to the widow, and the other to the Crown: *Cave* v. *Roberts*, 8 Sim. 214.]

(*d*) ["The Statute of Distributions," said Lord Cottenham in *Withy* v. *Mangles*, 10 Cl. & Fin. 248, (stated ante, p. 350), "accurately preserves the distinction between 'next of kin,' and those to whom it directs the distribution of the personalty. If there be no children, it directs the distribution of the estate equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them; and then confines the representation within brothers' or sisters' children; not treating the rights of those who take by representation as belonging to them as next of kin, but as derived

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who legally represent them; but no representations to be admitted among collaterals after brothers' and sisters' children. If no wife, then all the estate equally amongst the children; and if no child, then to the next of kindred in equal degree, and their legal representatives as aforesaid. The statute also provides, that no distribution shall be made till the expiration of a year, and that persons to whom it shall be made shall give bond with sufficient sureties to refund, if any debts owing by the intestate should thereafter be recovered. The act not to prejudice the customs of London and York.

Claim of surviving husband.

This statute, it will be observed, does not recognise the title of a surviving husband, on whom, therefore, it might seem to impose the obligation of distributing the personal estate of his deceased wife, not reduced into possession in her lifetime, amongst her next of kin. This led to the passing of the act of 29 Car. 2, c. 3, s. 35, which enacted, that the previous statute should not extend to the estates of feme coverts dying intestate, but that the husband might have administration as before.

Mother may claim with brothers and sisters.

Doubt seems also to have existed in regard to the relative claims of brothers or sisters, and the mother, being a widow; to remove which, the stat. 1 Jac. 2, c. 17, provided, that if, after the death of the father, any of the children died intestate, without wife or children, in the lifetime of the mother, every brother and sister, and their representatives, should have an equal share with her. This statute is obviously defective in expression, there being no provision for the case of both a wife and mother surviving; but the defect has been supplied by decision: for, where an intestate left a wife and mother, and several nephews and nieces, the children of a deceased brother, his personalty was held to be divisible into fourths, of which two belonged to the widow, one to the mother, and one to the nephews and nieces: *Stanley* v. *Stanley*, 1 Atk. 455; *Keylway* v. *Keylway*, 2 P. W. 344. The word "representatives" in this statute (i. e. stat. 1 Jac. 2, c. 17) receives the same construction as the word occurring in the previous general act, which restricts representation among collaterals (but among them *only*) to the children of brothers and sis-

from others, who, if they had lived, would have been next of kin. If the familiar expression, 'next of kin under the statute,' be considered as having reference to this provision of the statute, it will not be found to be so inaccurate as has been supposed. The question, however, is not whether 'next of kin under the statute' has not been inaccurately used as describing those who are entitled under the statute, but whether the term 'next of kin,' without any reference to the statute, has received any such judicial construction. A short examination of the cases will shew that the contrary is established by a very great preponderance of authority."]

ters; *Pett's case*, 1 P. W. 26; and hence a surviving mother is entitled in exclusion of the *grandchild* of a deceased brother. See *Stanley* v. *Stanley*, 1 Atk. 457; [*Withy* v. *Mangles*, 10 Cl. & Fin. 215.] INTESTACY.

Of course, a mother-*in-law* is not entitled to the maternal share; she is to all intents and purposes a stranger. See *Duke of Rutland* v. *Duchess of Rutland*, 2 P. W. 216. Mother-in-law.

Distributive shares, under the act of 22 & 23 Car. 2, c. 10, vest immediately on the intestate's decease, but not so as to exclude an infant en ventre sa mere: *Edwards* v. *Freeman*, 2 P. W. 440; *Wallis* v. *Hodson*, 2 Atk. 113. Posthumous children not excluded.

The restriction of the right of representation among *collaterals* to brothers' and sisters' children, of course, has the effect of entitling the child of a deceased brother in exclusion of the grandchild of another deceased brother; or, in other words, a living nephew is preferred to the child of a deceased nephew; *Pett's case*, 1 P. W. 26; and, upon similar grounds, the child of a deceased uncle is denied participation with a living uncle: *Maw* v. *Harding*, Pre. Ch. 28. Right of representation.

Wherever any person claims under the representative clause in the statute, the distribution is necessarily per stirpes. Thus, if the intestate, a widower, happen to have left a child and two grandchildren, the children of a deceased child, his personal property becomes divisible into moieties, of which one goes to the surviving child, and the other to the two grandchildren. But if all the claimants are of equal degree, whatever that degree be, the distribution is per capita; for instance, if the only descendants are three grandchildren, the issue of two deceased children, or if the next of kin consists of three nephews, the children of a deceased brother and sister, the distribution will not be (as before) in moieties, but each grandchild or each nephew (as the case may be) will take one-third: *Davers* v. *Dewes*, 3 P. W. 41; *Lloyd* v. *Tench*, 2 Ves. sen. 213. Distribution, when made per stirpes. —when per capita.

The statute has been decided to include indifferently the relations of the whole and those of the half-blood: *Smith* v. *Tracy*, 2 Vent. 317; *Burnet* v. *Mann*, 1 Ves. sen. 156; [*Jessop* v. *Watson*, 1 Myl. & K. 665.] Relations of half-blood.

At the present day, very few questions arise concerning relative proximity of kindred, the computation of its degrees being regulated by principles which have been long settled, though this certainty was not arrived at until many adjudications had taken place on disputed points.

In the case of *Mentney* v. *Petty*, Pre. Ch. 593, the Master of the Rolls observed, that the rule was taken from the civil law, and not Mode of computing degrees of consanguinity.

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from the canon law, between which there was a wide difference in the computation of the degrees of proximity; for the *canon law*, prohibiting marriage between relations till after the fourth degree, that they might exclude as many as possible from the liberty of marriage within those degrees without a dispensation, reckon all in the direct ascending or descending line, and those in the collateral line corresponding with them, to be but one degree; as, for instance, father or mother, uncle or aunt, make but one degree; so, grandfather or grandmother, great uncle or great aunt, make but two degrees: but, by the *civil law*, the father or mother make one degree, the grandfather or grandmother two degrees, and the uncle and aunt three degrees; so that the grandfather or grandmother, in the distribution of an intestate's estate, shall be preferred before the uncle or aunt, as being nearer of kin, within the rules of computation or the law of proximity, by the civil law; and so it was decreed by my Lord Chancellor Cowper, in the case of *Duppa*, for the grandmother, against the uncle or aunt. But, if you go one degree further, and reckon to the great grandfather or grandmother, they are in equal degree with the uncle or aunt, as they are in the third degree in direct lines with the uncle or aunt, who are in the third degree in the collateral line; for you must reckon through the grandfather or grandmother to come to the uncle or aunt, and then they are in just the same degree of remove from the nephew or niece in the collateral line, as the great grandfather or great grandmother are in the direct ascending line, and consequently, being in equal degree of kindred by the rules of computation of the civil law, are equally entitled to the distributive shares with the uncle or aunt. See also *Woodroff* v. *Wickworth*, Pre. Ch. 527; *Blackborough* v. *Davis*, 1 P. W. 41; [*Withy* v. *Mangles*, 10 Cl. & Fin, 215, ante, p. 350.]

Points decided respecting consanguinity.

Applying the principle just stated, it will be obvious that uncles and aunts are on an equal footing with nephews and nieces: *Durant* v. *Prestwood*, 1 Atk. 454; *Lloyd* v. *Tench*, 2 Ves. sen. 213. The like equality, of course, prevails among their respective children, i. e. first cousins and great nephews and nieces; *Thomas* v. *Ketteriche*, 1 Ves. sen. 333; who consequently are postponed to uncles and aunts, nephews and nieces: *Maw* v. *Harding*, Pre. Ch. 28; *Bowers* v. *Littlewood*, 1 P. W. 594. Some difficulty was felt in adjusting the relative claims of the grandfather or grandmother, and of the brother or sister: the former clearly was in the second degree; and it was contended with some plausibility, that, as the latter could only be reached through the father and mother, he was at an equal distance, in point of consanguinity, from the intestate. It was decided,

however, that, having regard to the doctrine of the civil law, and the rules in force before the statute, the brothers and sisters were entitled in preference to the grandfather and grandmother: *Evelyn* v. *Evelyn*, Amb. 191, 3 Atk. 762.

Inconveniences of intestacy.

But though there is now little room for disputation, in regard to the proximity of relationship, yet the disposition of property which the statute makes, however fair and equitable in the main, is too simple to satisfy the various exigencies of family provisions, and would seldom be deliberately adopted. For instance, a man having a wife and children rarely intends to (as the statute would) give to the wife a distributive share in the capital, but more commonly means to restrict her to a life interest; and the shares of children who are minors, or who are or may become married women, require modifications adapted to infancy and coverture. And even where it is not intended materially to vary the destination of the property, testacy is generally to be preferred to intestacy. Some of the grounds of this preference are, that a testator is enabled to place the legal control over the property in the hands of his own nominee, with regulated powers, instead of its being intrusted to the person or persons who may happen to obtain administration, and whose authority is for many purposes inconveniently narrow; besides which, when the next of kin are numerous, their equal right to administer sometimes occasions disputes. A will also prevents (or at least ought to prevent) questions among children respecting advancements (presently noticed). Nor is this all: to obtain probate of a will is a simpler proceeding than to take out letters of administration (though certainly the difference is slight), the duty is rather lower (*a*), and, what is more im-

Difference in rate of duty on wills and administrations.

(*a*) The difference between the duty imposed on probates of wills and letters of administration operates as a tax on intestacy. The reason for this difference is not obvious. Probably it was considered, that, as the rate of duty on legacies and distributive shares diminishes in proportion to proximity of relationship, and as the Statutes of Distribution give the property to the *nearest* relation, an administration is, in this point of view, generally less productive to the revenue; but this is far more than counterbalanced by the consideration that the law, under an intestacy, divides the personal property in absolute shares among the next of kin, on whose decease respectively those shares, if still their property, become again taxable; while, on the other hand, a will, by suspending the absolute ownership (as it frequently does) during the enjoyment of several successive takers, shifts the property to new hands, without subjecting it to any fresh impost. The difference thus occasioned is much greater than is commonly imagined. For instance, suppose a widower, with six children, to die intestate, and five of such children afterwards to die infants, unmarried and intestate; the absolute sixth share of each child in his father's personal estate, would, of course, in the first instance, be liable to duty; and, on the respective deceases of the five dying children, their shares (and, as

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portant, the intention in favour of presumed next of kin is less exposed to hazard by making an express gift to them, than by confiding their interests to the law of succession. For example: suppose a man to have an only brother, whom he presumes to be his next of kin, and that, intending his brother to succeed to his property, he dies intestate; the claim of such brother might have to compete with the adverse pretensions of another relation of the same degree, whom the deceased had never known or recognised as such, or who was supposed to be dead; or it might even turn out, that, in consequence of an irregularity in the marriage of the parents of the deceased, and of his reputed brother, no legal relationship subsisted between them; in which case the title of the latter would be wholly supplanted by that of the Crown. In such cases administration is granted to the patentee of the Crown: *Jones* v. *Goodchild*, 3 P. W. 33.

Hotchpot clause in stat. 22 & 23 Car. 2, c. 10.

The hotchpot clause in the statute of 22 & 23 Car. 2, c. 10, has given rise to many questions. It has been held not to apply to the case of an advancement by a widow, its language being exclusively applicable to the male parent; *Holt* v. *Frederick*, 2 P. W. 356; though, seeing how intimately this clause is connected with the general enactment, there seems to be much difficulty in supporting such a construction, except upon grounds that would exclude the case of a widow dying intestate from the statute altogether, which clearly would not be listened to.

Points decided respecting advancements, under the stat. 22 & 23 Car. 2, c. 10.

The advancement clause is considered to have been inserted for the mere purpose of producing equality among the children and their representatives, and consequently cannot be made to augment the distributive share of the widow: *Ward* v. *Lant*, Pre. Ch. 182; *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51.

The children of a deceased child, who was advanced by the intestate in his lifetime, are clearly bound to bring into hotchpot what their parent received, in like manner as such parent, if living, must have done: *Proud* v. *Turner*, 2 P. W. 560.

Mere alimony not an advancement.

In order to constitute an advancement, the gift must be by way of portion or preferment to set the child up with: 1 Ves. sen. 17. Hence, a mere allowance by way of maintenance is not sufficient; see 2 P.

to all subsequent to the first, their *derivative* as well as original shares) would again become subject to the operation of both the administration and distributive share duties, constituting an aggregate far exceeding what attached on the original devolution of the property from the father to the children, and which would have been wholly avoided if he (the father) had left a will bequeathing the shares (in the ordinary way) to the children attaining majority. As a measure of fiscal policy, therefore, the discouragement of intestacy must be pronounced rather short-sighted.

W. 449; (unless, perhaps, where extended to a daughter after marriage, 3 Atk. 528); nor will small presents of money for wedding clothes, travelling expenses, or other such purposes, be so considered; 3 P. W. 317, 3 Atk. 528; nor even the payment of an apprentice fee, being in the nature of a consideration for maintenance. Secus, as to the purchase of any office or promotion, civil or military. See 3 P. W. 317, n.; *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51.

Annuity deemed an advancement.

An annuity settled on a child is an advancement, though given expressly for maintenance; *Hern* v. *Barber*, cit. 1 Ves. sen. 17; and is to be estimated at its value when granted, unless the annuity should happen to have ceased, in which case it seems the child would have an option to bring in the sum actually received: *Lord Kircudbright* v. *Lady Kircudbright*, 8 Ves. 51. Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement, and it is not the child's estate for life only that ought to be brought in.—Per *Lord Hardwicke*, 2 Atk. 635.

Provision need not be voluntary.

It is not essential to a statutory advancement, that it be gratuitous or voluntary; for a portion secured by a marriage settlement has been decided to be such; *Edwards* v. *Freeman*, 2 P. W. 435; nor need it be payable or even vested before the intestate's decease; it is sufficient that the child has *in event* become entitled under a settlement made in the intestate's lifetime: *Edwards* v. *Freeman*, 2 P. W. 435 (*a*).

Rule where intestacy is partial.

A legacy, not being a provision "in the lifetime," need not be brought into hotchpot by a child claiming "a share" in the undisposed-of residue: 2 Swinb. 165, 2 P. W. 440. Indeed, the doctrine is confined to cases of intestacy; for if, by the will, an executor is appointed, which is at law (though now at law only (*b*),) a disposition of the entire personal estate, it seems that the hotchpot clause of the statute would be excluded. And, therefore, where A. made a will, appoining an executor, and bequeathing certain legacies, but not the residue, which was held to be distributable under the statute, a daughter of the deceased, who had received a marriage portion, was held to be entitled to her full share of such residue: *Vachell* v. *Jefferys*, Pre. Ch. 170; see also *Cowper* v. *Scott*, 3 P. W. 125. The mere appointment of an executor would produce the same excluding

Advancement where intestacy is partial.

(*a*) In this case the contingency had happened; otherwise, it seems to have been thought that distribution must have been suspended until it did happen: sed quære.

(*b*) [Vide stat. 11 Geo. 4 & 1 Will. 4, c. 40, stated ante, p. 253; *Mapp* v. *Elcock*, 15 Sim. 563.]

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effect, even though *no* part of the personalty were *beneficially* disposed of: *Walton* v. *Walton*, 14 Ves. 324. Lord Hardwicke appears to have ruled, that an advanced child might claim a share in that portion of the personal estate which, by the customs of London and York, is distributable according to the Statute of Distributions, without bringing the advancement into hotchpot: *Hearn* v. *Barber*, 3 Atk. 214.

What provision for the heir deemed an advancement.

Real estate descending to the eldest son is, by the express terms of the statute, not to be deemed part of his distributive share; and this has been held to extend to any other child whom custom makes heir: *Lutwyche* v. *Lutwyche*, Forr. 276. Monies expended by the father in the improvement or repair of houses which he afterwards suffers to descend, are of course undistinguishable from any other descended realty: *Smith* v. *Smith*, 5 Ves. 721.

It is conceived that a settlement of *real estate* on the eldest son *by deed*, would not be an advancement within the meaning of the statute, of which the terms are "by descent *or otherwise*." See 5 Ves. 723. However, *personalty* settled on the heir clearly must be brought into hotchpot by him; *Phiney* v. *Phiney*, 2 Vern. 638; see 8 Ves. 55; but money which is absolutely to be laid out in land would be regarded, it seems, as a settlement of land. Vide *Hume* v. *Edwards*, 3 Atk. 453.

Distribution under the customs of London and York.

The Statute of Distributions expressly saves the customs of the city of London and the province of York, the operation of which, extending as they do over two large and opulent districts, ought not to be passed over without some, though it must be a partial, notice. These customs do not now interfere with the testamentary power of disposition over the entire property, by the exercise of which they may be wholly excluded; (vide stat. 4 & 5 W. & M. c. 2, 2 & 3 Ann. c. 5, 11 Geo. 1, c. 18); and they only apply in the case of total intestacy; for where one seventh share of the personal estate of a freeman of London lapsed by the legatee's decease in the testator's lifetime, it was held to be distributable under the statute; *Cowper* v. *Scott*, 3 P. W. 119; and in a recent case the mere appointment of an executor was held to exclude the custom of York: *Fitzgerald* v. *Field*, 1 Russ. 425. The custom of London extends to the personal property, wherever situate, of freemen, (as well honorary as others, *Onslow* v. *Onslow*, 1 Simons, 18), dying in London or elsewhere; that of York, to any inhabitant or householder within the province dying there or elsewhere. Under both customs, the personalty of the intestate after payment of debts and allowing to the widow her "chamber," (which appears to comprise wearing-apparel

and furniture for her bedchamber, (2 Atk. 636 (*a*)), is distributed as follows:—If the intestate left a widow and child or children, the widow takes one third by the custom, the child or children another third, and the remaining one-third (called the dead man's part, because formerly distributable by the ordinary ad pios usus,) is distributed according to the Statute of Distributions, which, it will be remembered, gives one-third to the widow, and the remaining two-thirds to the child or children; hence the result is, that, by the combined effect of the custom and the statute, the widow takes four-ninths and the children five-ninths. If there is a widow and no child, the widow takes one moiety by the custom and half of the remaining moiety by the statute, making three-fourths of the whole. If the intestate left a child or children and no widow, the child or children would take the entire personalty, one moiety by the custom and the other by the statute. Vide 3 Atk. 527. If he has neither wife nor child, the custom is wholly excluded, as it does not extend to grandchildren: 1 Vern. 367, 2 Salk. 426. There are two material points of difference between the respective customs of London and York: one is, that, in London, the children could not (even before the stat. 7 Will. 4 & 1 Vict. c. 26) dispose of their orphanage part until the age of twenty-one; 2 Vern. 558; and if they die under that age, whether *sole* or married, their shares survive to the other children; Pre. Ch. 537. [And in the case of *Bruin* v. *Knott*, 12 Sim. 436, Sir L. Shadwell, V. C., acted upon a certificate of the Lord Mayor and Aldermen of London, (the Recorder of London also appearing in court and certifying ore tenus (*b*)), that, by the custom of London, where there are several orphan children of a freeman, who dies intestate, the share which any one may take by reason of surviving a child that dies an infant, survives among the other children, in case of the death of the party to whom it has come under the age of twenty-one years; and if there be an accumulation of interest upon an orphanage share, the accumulation survives in the same manner as the original share. In the same case, the Vice-Chancellor also decided another point as to maintenance, which part of the order was reversed upon appeal, (1 Phillips, 572); Lord Lyndhurst being of opinion, that a mother is entitled to a complete indemnity for the money actually expended on her child's maintenance within proper limits, but nothing more; and that the allowance ought to be paid

(*a*) [See *Bruin* v. *Knott*, 12 Sim. 436, where it is said, that the widow "retained her *widow's* apparel and the furniture of her bedchamber."]

(*b*) [The certificate was dated the 26th of July, 1842; but the Recorder did not certify ore tenus until the 28th.]

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out of the income of that fund in which the child had a defeasible interest, rather than out of other property to which he was absolutely entitled. See also 12 Jur. 616, where the Vice-Chancellor, in the same case, held, that the administratrix must bear the costs of the suit.] The other difference is, that in York the heir at common law, who inherits *any* land, either in fee-simple or fee-tail, however inconsiderable in value, is excluded from any filial part under the custom: Swinb. 231.

Points respecting advancements under the customs.

Though, for many purposes, advancements under the customs and under the Statutes of Distribution (ante, p. 406) are subject to the same rules, (3 Atk. 528), yet there are some distinctions between them. For instance, the custom of London requires that the advancement should be of personalty and upon marriage: *Hume* v. *Edwards*, 3 Atk. 452. According to some authorities, the marriage of a freeman's child against his consent, unless he is afterwards reconciled, forms a ground of exclusion; see *Hume* v. *Edwards*, 3 Atk. 451; see also 1 Vern. 354; but this is elsewhere denied: *Hill* v. *Blacket*, Cas. temp. Finch, 248; 2 Bac. Ab., Gwill. ed., 252. A freeman's child will, it seems, be wholly excluded by an advancement, of which the amount is uncertain; (see 3 Atk. 527, also 452); and the certainty must appear by some writing signed by the father: *Chace* v. *Box*, 1 Eq. Ca. Ab. 155.

Wife's customary share barred by settlement.

It may be observed, that, where the widow is barred by settlement of her customary share, the same distribution takes place which would have been made if the deceased had left no wife: *Rawlinson* v. *Rawlinson*, cit. 2 Atk. 644. But the points respecting the bar by settlement are of little importance, now that the husband has the power of excluding the custom by his will, which has put an end to the necessity, and occasioned the disuse of ante-nuptial stipulations thereon. It is observable, that the principle of the statutes, which threw open to the testamentary disposition of the owner personalty distributable under the customs in question, is precisely similar to that of the recent enactment respecting dower. For other points respecting the customs, vide the Digests and books treating of the customs of London.

[As to the right of the Crown to the personal estate of an intestate who leaves no relations, see *Middleton* v. *Spicer*, 1 B. C. C. 202; *Taylor* v. *Hoggarth*, 14 Sim. 8; *Jones* v. *Goodchild*, 3 P. W. 32; *Carr* v. *Roberts*, 8 Sim. 214; *Dyke* v. *Walford*, 12 Jur. 839.]

7 WILL. IV & 1 VICT. CAP. 26.

STAT. 7 WILL. 4 & 1 VICT. C. 26.

An Act for the Amendment of the Laws with respect to Wills.

(*Royal Assent, July 3rd, 1837*).

Explanation of Terms.

Sect. 1. Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which, in their ordinary signification, have a more confined or a different meaning, shall, in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say), the word "*will*" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knight's Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof;" or by virtue of an act passed in the Parliament of Ireland, in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knight's Service," and to any other testamentary disposition; and the words "*real estate*" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "*personal estate*" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money, (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Meaning of certain words in this act;

"Will:"

12 Car. 2, c. 24.

14 & 15 Car. 2, (I.)

"Real estate:"

"Personal estate:"

Number:

Gender.

STAT. 7 WILL. 4 & 1 VICT. c. 26.

Repeal Clause.

Repeal of the Statutes of Wills 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5.

10 Car. 1, Sess. 2, c. 2, (I.)

Sects. 5, 6, 12, 19, 20, 21, and 22 of the Statute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12, (I.)

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10, (I.)

Sect. 9 of 14 Geo. 2, c. 20.

25 Geo. 2, c. 6, (except as to colonies).

25 Geo. 2, c. 11, (I.)

Sect. 2. And be it further enacted, that an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards, and Primer Seisins, whereby a man may devise two parts of his Land;" and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an act passed in the Parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, &c., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an act passed in the Parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an act passed in the Parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates pur autre vie; and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an End to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an act passed in the Parliament of Ireland in the same

twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates;" and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates pur autre vie to which this act does not extend.

STAT. 7 WILL. 4 & 1 VICT. c. 26.

55 Geo. 3, c. 192.

General Enabling Clause.

Sect. 3. And be it further enacted, That it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant-right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof, by deed or will; and also to all rights

All property may be disposed of by will,

comprising customary freeholds and copyholds, without surrender and before admittance, and also such of them as cannot now be devised;

estates pur autre vie;

contingent interests;

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rights of entry, and property acquired after execution of the will.

of entry for conditions broken, and other rights of entry, and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Fees on Copyholds.

As to the fees and fines payable by devisees of customary and copyhold estates.

Sect. 4. Provided always, and be it further enacted, That where any real estate of the nature of customary freehold or tenant-right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or inrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will, shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or inrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Copyholds.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

Sect. 5. And be it further enacted, That when any real estate of the nature of customary freehold or tenant-right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or

the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services, as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, &c., when such estates are not now devisable, as he would have been from the heir in case of descent.

Estates pur autre Vie.

Sect. 6. And be it further enacted, That if no disposition by will shall be made of any estate pur autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee-simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

Estates pur autre vie.

Age of Testator.

Sect. 7. And be it further enacted, That no will made by any person under the age of twenty-one years shall be valid.

No will of a person under age valid;

Married Women.

Sect. 8. Provided also, and be it further enacted, That no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.

nor of a feme covert, except such as might now be made.

STAT. 7 WILL. 4 & 1 VICT. c. 26.

Execution of Wills.

Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

Sect. 9. And be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

Execution of Testamentary Appointments.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

Sect. 10. And be it further enacted, That no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Wills of Soldiers and Seamen.

Soldiers' and mariners' wills excepted.

Sect. 11. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act.

Petty Officers and Seamen in the Navy and Marines.

Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen and marines.

Sect. 12. And be it further enacted, That this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth, and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.

Publication.

Publication not to be requisite.

Sect. 13. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof.

STAT. 7 WILL. 4 & 1 VICT. c. 26.

Attesting Witness's Competency.

Will not to be void on account of incompetency of attesting witness.

Sect. 14. And be it further enacted, That if any person who shall attest the execution of a will shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Gifts to Attesting Witnesses.

Gifts to an attesting witness to be void.

Sect. 15. And be it further enacted, That if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate, (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

Creditor Attesting Witness.

Creditor attesting to be admitted a witness.

Sect. 16. And be it further enacted, That in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor Attesting Witness.

Executor to be admitted a witness.

Sect. 17. And be it further enacted, That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Revocation by Marriage.

Will to be revoked by marriage, except &c.

Sect. 18. And be it further enacted, That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appoint-

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ment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

Revocation by Presumption.

No will to be revoked by presumption.

Sect. 19. And be it further enacted, That no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

Revocation by Subsequent Will or Codicil, or Destruction of Instrument.

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

Sect. 20. And be it further enacted, That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Obliterations and Interlineations.

No alteration in a will shall have any effect, unless executed as a will.

Sect. 21. And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid, or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will.

Revival of Revoked Will.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

Sect. 22. And be it further enacted, That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and shewing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked

before the revocation of the whole thereof, unless an intention to the contrary shall be shewn. STAT. 7 WILL. 4 & 1 VICT. c. 26.

Revocation—Subsequent Conveyance.

Sect. 23. And be it further enacted, That no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. A devise not to be rendered inoperative by any subsequent conveyance or act.

Will speaks, from what Period.

Sect. 24. And be it further enacted, That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. A will shall be construed to speak from the death of the testator.

Lapsed and void Devises.

Sect. 25. And be it further enacted, That, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will. A residuary devise shall include estates comprised in lapsed and void devises.

General Devise—Copyholds, Leaseholds.

Sect. 26. And be it further enacted, That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will. A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

General Devise—Appointment.

Sect. 27. And be it further enacted, That a general devise of the A general gift

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shall include estates over which the testator has a general power of appointment.

real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

Fee-simple without Words of Limitation.

A devise without any words of limitation shall be construed to pass the fee.

Sect. 28. And be it further enacted, That where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

Words importing Failure of Issue.

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

Sect. 29. And be it further enacted, That, in any devise or bequest of real or personal estate, the words "*die without issue*," or "*die without leaving issue*," or "*have no issue*," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Exceptions.

Estate of Trustees.

No devise to

Sect. 30. And be it further enacted, That where any real estate

(other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

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trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

Sect. 31. And be it further enacted, That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

Lapse of Estate Tail.

Sect. 32. And be it further enacted, That where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Devises of estates tail shall not lapse.

Lapse—Children or Issue dying in Testator's Lifetime.

Sect. 33. And be it further enacted, That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

When Act operates.

Sect. 34. And be it further enacted, That this act shall not extend to any will made before the first day of January, one thousand eight

Act not to extend to wills made before

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1838, nor to estates pur autre vie of persons who die before 1838.

hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Scotland.

Act not to extend to Scotland.

Sect. 35. And be it further enacted, That this act shall not extend to Scotland.

Act may be altered this session.

Sect. 36. And be it enacted, That this act may be amended, altered, or repealed by any act or acts to be passed in this present session of Parliament.

COMMON FORMS IN WILLS.

COMMENCEMENTS, &c. (*a*).

1 *a*. I [*testator*], of &c., DO HEREBY REVOKE (*b*) all wills and testamentary dispositions and appointments heretofore by me made, and do declare this to be my last and only will and testament. Commencement of will. Revocation of former wills.

1 *b*. THIS IS THE LAST AND ONLY (*c*) WILL of me, [*testator*], of [*town residence*], and also of [*country residence*], only son and heir-at-law of [*father*], late of ——, deceased, by [*mother*], his late wife, deceased (*d*), and also sole heir-at-law of my uncle, [*name*], late of ——, deceased. Another form.

(*a*) [Although all the clauses to be found in ordinary wills may be classified and reduced to a moderate number of Common Forms, yet their combinations in practice create such variety, that scarcely any two wills are alike, and a complete will is therefore seldom available as a precedent, beyond furnishing a few of the forms which the draughtsman must gather from many sources and put together, with more or less of alteration, in a new order. For this reason, precedents of complete wills are far less useful than precedents of conveyances, leases, mortgages, settlements, and other instruments, of which, their scope being both narrower and better defined than that of wills, the conveyancing elements are fewer and recur more often in the same combinations. I have, therefore, omitted many of the Precedents which were printed in the former edition, and reduced others to skeletons, filling the space thus gained with Common Forms, which have been selected from the omitted precedents and other sources. Many concise forms are introduced, as well for their intrinsic utility, as to afford hints for more elaborately expressed clauses, which could not have been introduced in sufficient variety within the space afforded by this part of the Volume.—G. S.] Plan of the Forms and Precedents in this Volume.

(*b*) [It is better expressly to revoke all former wills than to leave open the inquiry, whether they are wholly superseded by the new one. And it is safer to incorporate the revocation in the introductory words of the will than to leave it to be effected by a separate clause, which the draughtsman may forget to insert.] Revoking clause.

(*c*) [Here the word "only" amounts to a revocation of former wills.]

(*d*) [Where the testator is, or may become, entitled to property by descent from any person, it is prudent to state the relationship in his

Will conditional on not leaving issue.

2. But I direct that this will shall not take effect if I leave any issue surviving me (*a*).

Appointment of executors.

3 *a*. I nominate and appoint [*executor*], of &c., sole executor of my will.

3 *b*. I nominate and appoint my wife, [*name*], sole executrix of my will.

3 *c*. I nominate and appoint [*executors*], of &c., executors and trustees of my will.

3 *d*. I nominate and appoint my wife, [*name*], and my friends, [*executors*], executrix and executors of my will.

Wife and others executors, with legacies.

3 *e*. I nominate and appoint my wife, [*name*], during her widowhood, and also [*other trustees*], of &c., to be executors (*b*) and trustees of my will, requesting the said [*other trustees*] to accept £—— each, as some acknowledgment of the trouble they will be put to.

Executors, with legacies.

3 *f*. I nominate and appoint the said [*trustees*] executors and trustees of my will, and I give to them the sum of £—— each, in consideration of the trouble they will have in the execution of their office.

Wife a trustee only during widowhood.

3 *g*. I nominate and appoint my wife, [*name*], and [*other trustees*], to be executors (*b*) and trustees of my will; but if my wife should marry again, she shall thereupon cease to be an executor and trustee of my will, which shall thenceforth take effect and be executed in the same or the like manner as if the said [*other trustees*] had been originally appointed the sole executors and trustees.

Guardians and executors.

3 *h*. I nominate and appoint my wife, [*name*], to be guardian of my children during her widowhood. I nominate and appoint [*trustees*], of &c., to be executors and trustees of my will, and, after the decease or marriage of my wife, to be guardians of my children.

3 *i*. I nominate and appoint my wife, [*name*], during her widowhood, and also [*trustees*], to be executrix and executors and trustees of this my will, and guardians of the persons and

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will, which will then furnish primâ facie evidence of the fact. If the pedigree is not of the simplest kind, this is best done by recital.]

Possibility of issue should be provided for.

(*a*) [This clause is proper where a married testator, being childless, makes no provision for children by his will, if the birth of issue by his present wife is even remotely probable. But it is much better, under such circumstances, to insert a provision for children, the making of which might otherwise be prevented by neglect or incapacity.]

(*b*) [The use of the word "executors" with reference toseveral persons, one of whom is a female, is quite warrantable.]

estates of such of my children as shall be under the age of twenty-one years and unmarried at the time of my decease.

Wife guardian during widowhood,—then trustees or trustee.

3 *j*. I APPOINT my wife, [*name*], guardian of the persons and estates of my children during her widowhood; and, after the decease or marriage of my wife, I appoint the trustees or trustee for the time being of my will guardians or guardian of the persons and estates of my children. I APPOINT [*trustees*], of &c., executors and trustees of my will.

Trustees for the time being to be guardians.

3 *k*. I NOMINATE AND APPOINT my friends, [*executors*], of &c., executors and trustees of my will; And I APPOINT the said [*executors*] and the survivors and survivor of them, or other the trustees or trustee for the time being of my will, guardians or guardian of the persons and estates of my children during their respective minorities.

Proviso for cesser of guardianship.

3 *l*. I NOMINATE AND APPOINT [*trustees*] to be executors and trustees of my will; And I nominate and appoint the said [*trustees*], and the survivors and survivor of them, to be guardians and guardian of the persons and estates of my children during their respective minorities; But such guardianship to cease as to each of the said guardians who shall go to reside abroad, refuse or become incapable to act in the said guardianship, or become bankrupt or insolvent (*a*).

Guardians for sons, with special directions.

3 *m*. AND I NOMINATE AND APPOINT my said wife, [*name*], and the said [*trustees*], and the survivors and survivor of them, guardians and guardian of the persons and estate (*b*) of my son,

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(*a*) [As to the use of expressly extending the guardianship to the estates, see the next note.]

As to appointments of guardians.

(*b*) Another, and perhaps a preferable mode, is to constitute the trustees for the time being guardians, as in the forms (3 *j*) and (3 *k*), supra; but some gentlemen doubt whether the office of guardian can properly be vested in such a fluctuating body. [This opinion seems to be ill founded; for the stat. 12 Car. 2, c. 24, s. 8, authorises the father, by deed or will, "in such manner, and from time to time, as he shall respectively think fit, to dispose of the custody and tuition of such child or children for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons, in possession or remainder, other than Popish recusants." These words seem not to restrict the father to an appointment by name, but to leave it open to him to prescribe any mode of ascertaining the persons who are to be guardians. But the appointment, if void as to the person, will be effectual as to the property bequeathed, (if the guardianship is expressly extended to that), and even as to the person will generally be confirmed by the Court of Chancery. Vide infra, p. 433, n. (*a*).]

[The 9th section of the act explains that the authority of the guar-

[*name*], and of any son or sons I may hereafter have, during their respective minorities. And I direct that my said sons shall be under the personal care of my said wife until they shall respectively attain seven years of age. And as and when my said sons shall respectively attain the said age of seven years, or in the event of the death of my said wife before they shall have respectively attained that age, I direct that my said sons shall from thenceforth, during their respective minorities, reside with and be under the care of a private tutor, to be selected by their guardians or guardian for the time being.

Appointment of guardians for daughters, with substitution of other guardians in case of their death.

And I nominate and appoint my said wife, [*name*], and [A. B.], wife of [*name and description*], and the said [*one of the trustees*], and the survivors and survivor of them, to be guardians and guardian of my daughter, [*name*], and any daughter or daughters I may hereafter have, during their respective minorities and discovertures; And in the case of the death of my said wife and the said [A. B.] during the minority and discoverture of any of my said daughters, then and in such case I appoint [C. D.], the wife of [*name and description*], to be a guardian of my said daughters in the stead and place of my said wife and the said [A. B.]. And I further direct, that my said daughters shall reside with and be under the personal care of my said wife during their respective minorities and discovertures, if my said wife should so long live; But, in the event of the death of my said wife during the minority and discoverture of any of my said daughters, then and in such case I direct, that such of my said daughters as shall not then have attained the age of twenty-one years or been married, shall reside with and be under the personal care of the said [A. B.], until they shall respectively attain the age of twenty-one years

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dian is to extend to the custody of the profits of the real estate, and the custody, tuition, and management of the personal estate, of the ward. As in an executorship, so where there are several guardians, each one appears to have an independent authority: *Eyre* v. *Shaftesbury* 2 P. Wms. 106. See *Gilbert* v. *Schwenck*, 14 Mee. & W. 488. On the death of one of several guardians the office survives: 2 P. Wms. 106.]

[Of course a guardian cannot, without express authority, delegate his office; nor can a mother appoint a guardian: *Villareal* v. *Mellish*, 2 Swanst. 536.]

[A will, made since 1837, and not properly executed and attested under the new law, cannot operate as an appointment of guardians, unless it is sealed and may take effect as a deed.]

or marry, provided the said [A. B.] should so long live and should be willing to accept such charge; But in case the said [A. B.] should die during the minority and discoverture of any of my said daughters, or should decline accepting such charge as aforesaid, then I DIRECT that such of my said daughters as shall not then have attained the age of twenty-one years or been married, shall reside with and be under the personal care of the said [C. D.], until they shall respectively attain the age of twenty-one years or marry.

Guardians of children, including an illegitimate child.

3 *n*. I APPOINT my said wife and the said [*trustees*], and the survivors and survivor of them, the guardians and guardian of the persons and estates of each son of mine during his minority, and of each daughter of mine (including [*illegitimate daughter*] (*a*),) during her minority and discoverture.

Sister to have the care of daughters, with an annuity for each.

3 *o*. I REQUEST my sister, [*name*], to continue the care and education and maintenance of my daughters by my late wife. AND until they shall respectively attain the age of twenty-one years or marry, I DIRECT the trustees or trustee for the time being of my will to pay to my said sister, [*name*], during such time as she shall live and attend to the education and maintenance of my said daughters respectively, or either of them, the annual sum of £——, for and in respect of each such daughter, by four equal quarterly payments in every year, clear of legacy duty, the first quarterly payment to be made immediately upon or after my decease, and to be considered as a payment in respect of the quarter of a year ending with the day of my decease, and each such annuity to be continued, and, if necessary, apportioned up to the time when my said sister shall die or cease to attend to the education and maintenance of the daughter in respect of whom such annuity shall be paid, and to be in addition to the maintenance already provided for my said daughters by the settlement executed on my marriage with their mother. AND I APPOINT my said sister and my trustees or trustee for the time being guardians of the persons and estates of my said daughters during their respective minorities.

As to appointment of guardians of illegitimate children.

(*a*) With respect to the illegitimate child, this appointment of guardians will be invalid, as the testator does not stand in a recognised parental relation to her. The nomination, however, is not without use, as the Court of Chancery appoints to the guardianship persons nominated by a putative father, without any reference to the Master: *Ward* v. *St. Paul*, 2 B. C. C. 583; *Peckham* v. *Peckham*, 2 Cox, 46; *Chatteris* v. *Young*, 1 Jac. & W. 106.

Appointment of executors as to a specific debt, and appointment of the debtor and the other executors, executors of residue.

3 *p.* I APPOINT [A. B.], of &c., and [C. D.], of &c., to be my executors in respect of such debt or debts (if any) as are or may be owing to me from my brother [E. F.]. AND I APPOINT the said [A. B.], [C. D.], and [E. F.], to be my executors as to the residue of my personal estate, and to be trustees of my will and guardians of my children (*a*).

Bequest of leaseholds and policies.

3 *q.* I GIVE AND BEQUEATH to my son, [*name*], his executors, administrators, and assigns, my leasehold messuage at ——, with the appurtenances, in my occupation at the date of this my will, and all the term and interest I shall have therein at my decease, and any policy or policies of insurance of the said messuage against fire which may be subsisting at the time of my decease, and also any policy or policies of insurance of the life or lives mentioned in the lease or leases under which the said leasehold messuage may then be held. AND I APPOINT my said son, [*name*], executor of this my will, so far as relates to the said leasehold messuage and policies of insurance, but not in respect of any other part of my personal property and effects (*b*). AND I DIRECT, that the expense attending the

Legatee of leaseholds and policies to be limited executor.

(*a*) [The testator appoints special executors as to the debt owing from one of his general executors, in order that the remedy for the debt at law may be kept alive. Vide ante, Vol. 9, p. 795.]

Convenience attending the creation of a limited executorship.

(*b*) Where a leasehold estate or a legal chose in action is bequeathed specifically, it is convenient to constitute the legatee executor, quoad the subject of gift, for the purpose of clothing him with the rights, and of exempting the general executors from the risks, incident to the representative character in regard to the property in question; otherwise the legatee of a chose in action must be entrusted by the executors with an authority to sue in their names; and with respect to leaseholds, the executors become liable to the rent and covenants; and as such liability continues even after the property has been legally vested in the legatee by assent, (supposing the testator to have been bound by express covenant, and not merely in virtue of his ownership of the term), and after the executor has parted with the assets among the legatees, this is one of the most formidable responsibilities attendant on an executorship, and is a source of much perplexity and dispute between legatees and executors in regard to the indemnity which the latter are entitled to require. (Vide ante, Vol. 4, p. 435). In proportion as the rent approaches to the annual value of the property, and the covenants in the lease are onerous, of course the proposed scheme of exemption the more forcibly recommends itself. Too much regard cannot be paid by will-makers to every expedient calculated to facilitate the administration of the trust affairs, and to remove the objections which often deter cautious and capable men from filling, at the call of friendship or benevolence, these important posts of usefulness. The existence of extensive liabilities, contracted by

limited probate to be taken out by my said son shall be paid out of my residuary personal estate (*a*). And I appoint the said [*executors*] to be executors and trustees of my will, except as to the leasehold messuage and policies of insurance so as aforesaid bequeathed to my said son, [*name*].

4 *a*. I direct that my remains be interred, with as much privacy as possible, in my vault in the parish church of ——. Direction respecting funeral.

4 *b*. I direct that my funeral may be conducted with as much privacy as possible.

4 *c*. I desire that I may be buried in a private manner, without pomp or show, in some cemetery or churchyard near the place of my death, but not within any town, suburb, or village, and that neither hearse nor coach be employed at my funeral, but that my body be carried to the grave by six poor men, to be appointed by my executors, to each of whom I give one guinea, but no liquor. And I direct that the whole expense of my funeral shall not exceed 50*l*.; and if it fall short of that sum, I direct my executors to give or apply the surplus to or for the benefit of such poor people of the parish of ——, and in such manner, as they shall think fit.

4 *d*. I direct that the expense of my funeral shall not exceed £——.

5 *a*. In the first place, I direct that all my just debts and funeral and testamentary expenses be paid and satisfied, as soon as can be after my decease. Direction to pay debts. And I charge my freehold and copyhold estates with the payment thereof in aid of my personal estate (*b*). Charge of debts on real estate.

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a testator as a lessee, may supply a reasonable ground for renouncing an executorship to which those liabilities are adherent.

(*a*) It seems proper to declare on whom the expense of the limited probate is to fall, as the point may otherwise occasion dispute. The probate being short, the expense, it is presumed, must be inconsiderable, certainly much less than that of obtaining limited administration to a deceased trustee in respect of an attendant term of years, which, it will be observed, is an analogous proceeding. Expense of limited probate.

(*b*) [The effect of a charge of all the testator's debts on his real estate is to take the real estate out of the operation of the statutes against fraudulent devises, and of the statute 3 & 4 Will. 4, c. 104, which renders real estate liable to the testator's simple contract debts, and to subject it as *equitable* assets to the payment of all debts of whatever degree pari passu, so as to destroy the priority to which specialty debts would Effect of charge of debts.

Charge of debts.

5 *b*. I CHARGE all my freehold and copyhold estates with the payment of my debts (*a*).

Confirmation of marriage settlement.

6 *a*. IN the first place, I RATIFY AND CONFIRM the settlement made in contemplation of my marriage with [*name*], my present wife.

6 *b*. I CONFIRM the settlement made on my marriage with my said wife, whereby she will be entitled during her life to the interest of £—— sterling, and also the dividends of £——, Consolidated Three Pounds per Centum Annuities, with a power of appointment thereof amongst my children as therein is mentioned.

Wearing apparel to servant.

7 *a*. I GIVE AND BEQUEATH my wearing apparel to my servant [*name*], if he should be in my service at the time of my decease.

7 *b*. I GIVE AND BEQUEATH to my faithful servant [*name*], if she should be living in my service at the time of my decease,

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otherwise be entitled under those statutes. But as there still appears to be some doubt whether a mere charge of debts authorises the executors, either alone or together with the person or persons in whom the real estate is vested, to sell, (see *Dolton* v. *Hewen*, 6 Mad. 9; *Ward* v. *Devon*, 11 Sim. 160; *Tylden* v. *Hyde*, 2 Sim. & St. 238; *Ball* v. *Harris*, 4 Myl. & Cr. 264, ante, Vol. 5, p. 149; *Gosling* v. *Carter*, 1 Coll. 644), it is proper to give the executors an express power of sale.]

Necessity of explicitness as to personalty being exempt from debts and legacies.

(*a*) Among the testamentary obscurities which have from time to time created litigation and perplexed Judges, the neglect explicitly to declare whether a charge of debts and legacies on real estate is intended to exonerate the personalty, or to provide merely an auxiliary fund, holds a conspicuous place; and the inquirer into the subject will find himself embarrassed, at every step of his progress towards general and satisfactory conclusions, by a multitude of petty distinctions. He will indeed soon perceive, that a mere charge on the realty does not, per se, exonerate the personal estate, which continues to be the primary fund. It will also be apparent, that the cases agree in the position, that, in order to exempt the personalty, there must be either express words, or "demonstration plain," "manifest intent," or "necessary implication," to be collected from the whole will; but what amounts to such an indication of intention as will satisfy these significant words, is a species of knowledge accessible only to him who will undergo the labour of consulting some forty or fifty cases, from the perusal of which he will rise, if not fully satisfied with the result of the authorities, yet at least deeply impressed with the importance of explicitness on the point—a lesson which it is the design of these remarks to inculcate. See cases as to the exemption of personalty from debts and legacies, collected 2 Jarm. Wills, 564.

my wearing apparel, except such part thereof as my executors shall deem to be unsuitable, which I request may be given to my friend [*name*], if she should think proper to accept thereof, and to whom I also give my gold watch, necklace, ear-rings, and my other jewels and trinkets.

7 *c*. I DIRECT that my wearing apparel be distributed among my servants in such manner as my executors shall think proper. Wearing apparel among servants.

7 *d*. I GIVE AND BEQUEATH all my wearing apparel, watches, jewelry, trinkets, dressing-cases and utensils, and articles of personal decoration or ornament, to [*legatee*], for her own absolute use and benefit. Wearing apparel, trinkets, &c.

7 *e*. I GIVE AND BEQUEATH to my wife all my letters, copies of letters, correspondence, manuscripts, and writings, except documents of title, securities for money, vouchers, and accounts, relating to the property or rights of my heirs, executors, trustees, devisees, or legatees, or any of them. Letters, &c., to wife.

7 *f*. I GIVE AND BEQUEATH to my elder son, [*name*], my gold watch, with the chain, seals, and appendages thereto, or any other watch, chain, seals, and appendages, which I may use in lieu thereof at the time of my decease. Watch, &c.

7 *g*. I GIVE AND BEQUEATH to my younger son, [*name*], my horse and chaise, with the harness and other accoutrements belonging thereto, and any other horses and other animals, chaises and other vehicles, harness, and accoutrements, of which I shall or may be possessed at the time of my decease. Horse and chaise, &c.

7 *h*. I GIVE AND BEQUEATH to each of my friends, [*legatees*], two dozen of my best wine, to be selected by them in the order in which they are herein named. Wine.

7 *i*. I GIVE AND BEQUEATH all my coins, ancient sculptures, original inscriptions, and copies of inscriptions, manuscripts, and other antiquities, to the Trustees of the British Museum, to be deposited and kept in the department of antiquities there. Coins, &c., to British Museum.

7 *j*. I GIVE to my son [*name*] my collection of minerals and fossils, with the cabinets in which they are placed, requesting, but not insisting, that he will, unless he see reason to the contrary, leave them at his death to his brother, [*name*]. Minerals, books, &c., with a request as to their disposition.

7 *k*. I GIVE AND BEQUEATH to my wife, [*name*], all my music-books, and such of my printed and other books, not exceeding in the whole 100 volumes, as she shall select. AND I GIVE AND BEQUEATH the remainder of my books, whether printed or manuscript, except books of account, unto such

son of mine living at my decease as shall first attain the age of twenty-one years.

Books, &c.

7 *l.* I GIVE AND BEQUEATH to my son, [*name*], my book-cases and library of books, except my copy of ——, which, together with my best pianoforte, I give to my daughter, [*name*].

7 *m.* I GIVE AND BEQUEATH to my son, [*name*], all my books and manuscripts, and engravings not in frames, of which I shall be possessed at the time of my decease.

Book to be selected.

7 *n.* I GIVE AND BEQUEATH to my son, [*name*], my copy of ——, or such one other of my printed books (whether consisting of one volume or more) as he may select in preference thereto.

Picture to elder son, with recommendation.

7 *o.* I GIVE AND BEQUEATH to my elder son, [*name*], my valuable picture of —— by Rubens, and recommend, that, at his decease, he will give the same to my grandson, [*name*]; But I expressly declare that this recommendation shall not be construed to create a trust in favour of such grandchild, or in any manner to abridge or restrict the absolute property of my said son in the said picture (*a*).

Recommendation not to be deemed a trust.

7 *p.* I GIVE my drawing instruments and scientific and chemical apparatus and materials to my brother [*name*], hoping, but not insisting, that he will leave a considerable portion of them, at his decease, to my nephew, [*name*].

Books to son.

7 *q.* I GIVE to my son, [*name*], all my printed books, except editions of poets in any of the modern languages and books containing prints, which are works of art or copies of works of art; Which excepted books, together with my framed and unframed pictures, drawings, and prints, and my musical instruments, I GIVE to my trustees or trustee (*b*), IN TRUST for the separate use of my sister, [*name*], during her life, so long as she shall keep the same insured from damage by fire, to their full value, in the names or name of my trustees or trustee for the time being; desiring that an inventory thereof be taken and kept by my trustees or trustee, whom I authorise to determine what matters are contained in this or any other bequest in my will or any codicil thereto, and the value thereof; And after the decease of my sister, [*name*], I GIVE the same to my daughter [*name*], if she be then living; otherwise

Other books, pictures, &c., to sister for life; after her death, to daughter or niece.

(*a*) [As to the necessity of explicitness on this point, vide ante, p. 254.]

(*b*) [As to the propriety of interposing a trustee, vide infra, p. 446, n.]

to my niece [*name*], if she be then living: if both be then dead, the same to fall into my residuary personal estate.

7 *r*. I GIVE to my son, [*name*], my library of books, or such part thereof as he shall select, on condition that he pay to my executors two-thirds of the value thereof, or of such part thereof as he shall select, such value to be ascertained by valuers, one to be appointed by my executors and one by my said son. Books on payment of two-thirds of the value.

7 *s*. I GIVE to the Trustees of the British Museum, to be deposited in the public library there, all such of my printed books as they shall consider may be usefully added to the said library. Books to Trustees of British Museum.

8 *a*. I BEQUEATH the specific legacies following: namely, To my wife, [*name*] (*a*), all the wines, liquors, fuel, housekeeping provisions, and other consumable stores, which shall, at my decease, be in or about my then dwelling-house; To my son [*name*] my gold watch with its appendages; To &c. [*other specific legacies*]. AND I DIRECT the specific legacy hereinbefore bequeathed to my said wife to be delivered immediately after my decease, and the several other specific legacies hereinbefore bequeathed to be delivered within one calendar month after my decease. Consumable stores to wife. Other specific bequests. Time of delivery.

8 *b*. I GIVE AND BEQUEATH unto my son [*name*] all the household furniture and other chattels and effects of every description which shall be in and about the dwelling-house which I may happen to occupy at the time of my decease, (except money and securities for money, evidences and documents of title, and accounts and vouchers), for his absolute use and benefit. All the effects in a house, except money, &c.

8 *c*. I GIVE unto my wife, [*name*], all the household goods, plate, linen, china, glass, printed books, trinkets, fuel, wines, liquors, and housekeeping provisions, which shall be in and about my dwelling-house at the time of my decease. Furniture, stores, &c., to wife.

8 *d*. I GIVE AND BEQUEATH to my son [*second son*] all my books and manuscripts, and drawings and engravings not in frames, of which I shall be possessed at the time of my decease. I GIVE AND BEQUEATH to my son [*third son*] my cabinets of fossils, minerals, and specimens in natural history, including the contents thereof at the time of my decease. I Books to second son. Cabinet of minerals to third son.

(*a*) [It is proper to mention the wife's name, although the will would necessarily be revoked by a second marriage; because it may happen that the parties have never been lawfully married, in which case the name will assist in identifying the person intended.] As to naming the testator's wife.

Household effects, &c., to eldest son.

GIVE AND BEQUEATH to my son, [*eldest son*], all my household furniture, pictures of every description in frames, plate, linen, china, glass, musical instruments, watches, jewelry and trinkets, firearms, horses and carriages, and the equipage and furniture belonging thereto, cows, poultry, and other live stock, greenhouse and other plants in pots, gardening and husbandry implements, domestic animals, fuel, wines, liquors, and consumable stores, and other the household effects not hereinbefore bequeathed, of which I shall be possessed at the time of my decease. AND I DECLARE that the last-mentioned bequest shall comprise all effects, though not strictly household, which are applicable to personal use, ornament, occupation, or diversion, and are not hereinbefore otherwise specifically disposed of (*a*).

General bequest of goods in a house, with specific exceptions.

8 *e*. I GIVE to my wife, [*name*], all the goods and effects which shall be in or about my dwelling-house at the time of my decease [not otherwise specifically disposed of by will], Except money and securities for money, muniments of title, and vouchers and memoranda of accounts; [And also except such books, to the value of £——, (the value to be determined by my executors), as my son, [*name*], shall select for his own absolute benefit; And also except my saddle-horses, with their accoutrements, which I give to my son [*name*]; And also except my wearing apparel, which I give to my valet who shall be in my service at my decease.]

Pecuniary legacy to wife for immediate expenditure.

Bequest of effects in and about testator's town residence.

8 *f*. I GIVE AND BEQUEATH to my wife, [*name*], the sum of £——, to be paid to her as soon as conveniently may be after my death, for her immediate use and expenditure. I ALSO GIVE AND BEQUEATH to my said wife all my household furniture, plate, linen, china, glass, books, pictures, paintings, and other property and effects of every description, (except money and securities for money, muniments of title, books of account, and manuscripts (*b*)), which shall be in or about my town

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(*a*) For the reasons for introducing these special words at the close of this long enumeration of articles, see p. 401, and the next note.

As to bequests of household furniture, &c.

(*b*) It is of no inconsiderable importance to choose the most appropriate words for describing those articles of personalty which are often bequeathed separately from the general estate, such as household furniture, &c., since many questions arise on such bequests, though, as they relate to matters of small value, comparatively few of them become subjects of judicial consideration. To this probably we must ascribe the fact, that less attention has been paid to the framing of such gifts than to many other clauses of rarer occurrence.

house of residence [*or*, in or about any house or houses which I shall occupy or hold for residence at my decease] at the time of my decease, and also all my watches, jewelry, and

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Bequests of this kind are divisible into two classes, viz. those in which the articles in question are described with reference to locality, and those in which they are not so described. In the former class of cases, the utmost generality of description will commonly best answer the intention; for, where a testator bequeaths all his effects which shall be in and about his dwelling-house at the time of his decease, he usually means that every thing found there at the prescribed period shall pass to the legatee.

And even where part is intended to be excepted, if such exception embraces only a single class or a few classes of articles, it is better to describe the subject of the bequest by some general word, such as "effects," or "property," and introduce an exception descriptive of such articles, than to attempt an enumeration of the various classes of articles which the bequest is meant to comprise.

Whether money and securities for money will pass as goods and chattels in a house.

A testator seldom intends, under the bequests in question, to include money and securities for money, which therefore should be expressly excluded, especially the former; as it should seem, according to the cases, that money (including in this denomination bank and other notes payable to bearer on demand) *will*, and securities for money will *not*, pass under a bequest of goods and chattels in and about a particular house, the latter being merely the evidence of title to things out of the house, and not things in it. [Vide ante, p. 397, where this subject is further pursued. From the authorities there cited, it appears that the expression "household goods," or "household furniture," (which appear to be synonymous), include household linen, china, pictures hung up in frames, and, in ordinary cases, even plate and firearms used for domestic defence; but not fixtures, money, books, or globes or mathematical instruments, or victuals and other housekeeping stores of which the use is in the consumption, (so that they cannot be given for life only, *Andrew* v. *Andrew*, 1 Coll. 690), and of which, therefore, an additional mention is requisite, as a testator rarely intends things of this nature to fall into the residue, especially if it be made subject to a trust for sale. Such effects appear to be aptly described by the term "consumable stores," which will comprise some articles not included in the denomination of housekeeping provisions, such as hay, corn, &c. Books have been held to pass under a gift of household furniture, and all other articles of domestic use or ornament: Ante, p. 401.]

"Household goods" and "household furniture."

"Consumable stores."

"Household effects."

[The term "household effects" is more extensive than household goods or furniture, and has been held to include pistols, a turning lathe, models of ships, books, an organ, wines and liquors; but not fowling-pieces, a parrot, a pony, a cow, or a hay-stack intended for sale: Ante, p. 402.]

Fixtures.

[Where fixtures and fixed furniture were bequeathed, it was held that chimney-glasses and book-cases fixed by screws passed as fixed furniture, though they would not have passed as fixtures: *Birch* v. *Dawson*, 2 Ad. & Ell. 47.]

trinkets, (whether in such house or elsewhere), of which I shall be then possessed, for the absolute use and benefit of my said wife.

Pecuniary legacies to wife.

8 *g*. I GIVE AND BEQUEATH unto my wife, [*name*], the sum of £——, to be paid to her immediately after my decease, and the further sum of £——, to be paid to her within six calendar months next after my decease.

Paraphernalia, furniture, &c., to wife.

I ALSO GIVE AND BEQUEATH unto my said wife absolutely all her paraphernalia(*a*), wearing apparel and linen, and the watches, rings, trinkets, jewels, and personal ornaments usually worn by her or reputed to belong to her; and also all the fixtures usually deemed tenant's fixtures, and all the linen, plate, glass, china, earthenware, household furniture and effects, implements and utensils of husbandry and gardening, wines, liquors, fuel, provisions, and other consumable stores, horses and carriages of every description, with the harness and appurtenances, and other live and dead stock, of which I shall die possessed.

Mode of framing bequests of goods in a particular place.

[A bequest of goods or effects in and about a particular house is more extensive than a bequest of household goods or household effects, and, when so used, "goods" seems to be synonymous with "effects," passing, as has been already observed, money and all other chattels, except securities and muniments of title; and even a gift of property or personal estate in a particular place will not include mere securities; though perhaps a gift of all the testator's personal estate in a particular *county* might have a more extensive operation.]

[A bequest of all the goods and effects in and about a particular house, with a special exception of such things as are not intended to pass, will, perhaps, in the majority of instances, effect the object better and more certainly than a bequest of household goods, or household effects, or a laboured enumeration of various kinds of goods. See the form (8 *c*.) in the text.]

Paraphernalia.

(*a*) [The mention of the paraphernalia (i. e. articles of apparel, personal convenience, and personal ornament suitable to the rank of the party, and in use by her during the marriage) is superfluous, as they belong to the widow independently of the will, and cannot be taken from her by it: *Tipping* v. *Tipping*, 1 P. Wms. 730. They are to be last applied in payment of the husband's debts, and, if pledged by him, are redeemable out of the other parts of his estate: *Graham* v. *Londonderry*, 3 Atk. 393; *Snelson* v. *Corbet*, 3 Atk. 369; *Aldrich* v. *Cooper*, 8 Ves. 397. Whether the right of marshalling exists against a specific devisee, where the real estate is not charged with debts, is not settled; on principle, it is clear that it should extend against every volunteer. Care must be taken to distinguish paraphernalia, which are gifts by the husband or purchases with his money, from articles purchased with the wife's separate property, or given to her by strangers, whether expressly for her separate use or not, for such articles are, in equity, entirely beyond the husband's control.]

8 *h*. I GIVE the household furniture, household effects, and consumable stores which I may possess at my death, [not being in my messuage at ——,] to my wife, [*name*]. Household effects and stores to wife.

8 *i*. I GIVE to my said wife such portion of my plate as belonged to her before our marriage, for her own absolute use and benefit; And I GIVE the residue of my plate unto my children, [*names*], equally to be divided among them or such of them as shall be living at my decease, in equal shares; And in case any dispute should arise respecting the distribution of the said plate, I empower my executors to select and determine the specific articles to be taken by each legatee under the said bequest. Certain plate to wife. Residue of plate to children.

8 *k*. I GIVE unto my wife, [*name*], all my housekeeping provisions and consumable stores, (except wines and spirits), and also all my poultry, pigs, and other live stock, for her absolute use. I ALSO BEQUEATH to my said wife such of my furniture, plate, linen, china, wines, spirits, and utensils, as she shall choose and select, to the value of £——, [*or*, to the amount of one-half of the total value thereof,] which value I direct to be ascertained by two appraisers, one to be appointed by my said wife, and the other by my executors hereinbefore named, or by any other means which shall be agreed upon between my said wife and my said executors. Stores, poultry, &c. Furniture, &c., of a certain value. Valuation.

8 *l*. I GIVE to my wife the use, during her widowhood, of such articles (not exceeding in the whole the value of £——), as she shall within the first three months next after my decease select from my household furniture and household effects, such value to be determined by my trustees or trustee for the time being.

8 *m*. I ALSO GIVE to my said wife all the household furniture, plate, linen, china, glass, trinkets, printed books, horses and carriage, coals, wines, liquors, and housekeeping provisions, of which I shall be possessed at the time of my decease, or such part thereof as my said wife shall choose to select and retain for her own absolute use and benefit.

8 *n*. I GIVE all my wines and consumable stores, household furniture, household linen, plate, china, books, and other effects, other than money, securities for money, and documents of title, which shall be in or about my house at —— at my decease, unto my son [*name*], provided he and his family should, within three calendar months after my decease, quit and deliver up possession of the same house, with the appurtenances, unto my trustees or trustee for the time being; AND, if my said son and his family should not quit and deliver up Bequest of furniture, &c., to son, on condition of quitting messuage.

possession of my said house, I DIRECT that the said wines (*a*) and other effects shall form part of my residuary estate.

Furniture in certain rooms.

8 *o*. I GIVE to my daughter, [*name*], all the household furniture and effects which at the time of my decease shall be ordinarily used by her in the bed-chambers, nursery, and sitting-room then occupied by her and her children and her attendant, in my house.

Plate, books, &c., to son at twenty-one.

8 *p*. I GIVE all my plate and plated ware, printed books, book-cases, pictures, drawings and prints, to such son of mine living at my decease as shall first attain the age of twenty-one years.

Stores absolutely.

Furniture, &c., for life.

9 *a*. I GIVE to my wife, [*name*], all my housekeeping and other consumable stores for her absolute use and benefit; And I DIRECT that my said wife shall enjoy for her natural life such of my household furniture and other household effects which shall be in and about the house in which I may happen to reside at the time of my decease, as she shall think proper to select for that purpose; AND I DIRECT that my said wife shall not be required to sign any inventory of such effects (*b*).

No inventory.

Leasehold house and use of furniture to wife for life;

9 *b*. I GIVE to my wife my articles of jewelry, wines, and consumable stores, (not being part of my stock in trade), absolutely, and the use of such leasehold house as I shall reside in at my decease, and of my household furniture, household linen, plate, china, glass, and pictures, during her widowhood, if she should so long, at her own cost, keep the same house and articles in good repair and condition, (reasonable wear and tear only excepted), and insured in the names or name of my trustees or trustee for the time being to their full value from damage by fire, and pay the rent and perform the covenants to which the lessee of the said house may be liable. I DIRECT, that an inventory of the said articles whereof my wife is to have the use be taken as soon as convenient after my decease, of which my wife shall keep one copy, and my other trustees or trustee another; which other trustees or trustee are or is to determine the amount of insurance to be made by my wife,

Inventory to be taken.

(*a*) [The effect of this condition is not to suspend the legatee's right to consume the wines, but to make him liable to refund the value of such as he has consumed, if he do not perform the condition.]

Specific legatee for life to sign inventory.

(*b*) [In the absence of any special direction, a legatee for life of personal chattels will be ordered to sign and deliver an inventory, to be kept by the person next in succession, or deposited in the Master's Office, but not to give security: *Bill* v. *Kinaston*, 2 Atk. 81; *Slanning* v. *Style*, 3 P. Wms. 335; *Conduitt* v. *Stone*, 1 Coll. 285.]

and also what articles are included in either of the aforesaid gifts to her or for her use.

Wife to have the use of household furniture, &c.

9 *c*[1]. I GIVE AND BEQUEATH to my wife, [*name*], the personal use and enjoyment, in her house of residence for the time being in England, so long as she shall continue my widow and shall reside in England, of all my household furniture, plate, linen, china, glass, books, pictures, prints, musical instruments, and other effects of the like nature, which shall, at my decease, be in or about my then dwelling-house.

Delivery and inventory;

9 *c*[2]. AND I DIRECT my said other trustees or trustee for the time being to deliver the same to my said wife, [*name*], within one calendar month next after my decease, on her signing an inventory thereof, to be prepared and kept by such trustees or trustee, who shall at the same time deliver to her a copy of such inventory signed by them or him; And I empower my said other trustees or trustee, by writing under their or his hands or hand, to determine, in case of dispute, what articles shall be considered as included or not in the bequest lastly hereinbefore contained; And I exonerate them and him from all duty and responsibility in respect of the custody of the effects included in the same bequest, after such delivery thereof as aforesaid, until they or he shall receive actual notice that my said wife is dead or has married again, or is resident out of England.

—power to determine questions;

—trustees' responsibility.

Gift to wife of trinkets, wines, &c.

9 *d*. I GIVE AND BEQUEATH to my wife, [*name*], the residue of my trinkets, my wearing apparel, wines, and other consumable housekeeping stores, (other than such as may form part of my stock in trade), and also the horse and chaise, if any, of which I shall be possessed at the time of my decease, for her own absolute use and benefit; And I GIVE AND BEQUEATH to her, my said wife, the possession and use of my household furniture, plate, linen, china, glass, pictures, and my printed books, (except as aforesaid), of which I shall be possessed at the time of my decease, during her life, for her sole and separate use; And after her decease I GIVE AND BEQUEATH the same to my said son [*name*] absolutely, if he should be living at the decease of my said wife; But if he should be then dead, I GIVE the said effects unto my other child or children who shall be living at such decease, equally to be divided between or among them, if more than one, the partition and division thereof among such children to be made by the trustees or trustee for the time being of my will, in such manner as they or he in their or his discretion shall think proper. AND I DIRECT that, as soon as convenient after my decease, an inventory shall be

Use of furniture, &c., to wife for life;

—then to son;

—if dead, to other children equally.

Inventory to be taken.

made of the said effects hereinbefore bequeathed to my said wife for life, one copy whereof shall be kept by her, and the other shall be deposited with my other trustees.

Household furniture and effects to trustees, for separate and inalienable use of A. for life.

9 e^1. I GIVE AND BEQUEATH to the said [*trustees*], their executors, administrators, and assigns, all my books, household furniture, and household effects, UPON TRUST, to permit and suffer my wife [*or*, daughter], [*name*], to possess, use, and enjoy the same during her life, and, during any coverture, for her sole, separate, and inalienable use, independently of the control, interference, debts, or engagements of any husband.

Trustees to insure from fire;

9 e^2. [AND I DIRECT that the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, shall, from time to time, during the life of my said wife [*or*, daughter], apply a sufficient part of the annual produce and income payable to my said wife [*or*, daughter] under the trusts hereinafter declared, in insuring and keeping insured the said household furniture and household goods from damage by fire, to the full value thereof;

—to repair, &c.

and also in repairing or replacing such parts of the said household furniture and household effects as shall from time to time be damaged, worn out, destroyed, or lost.]

Trustees may permit furniture to be possessed by A. and her husband.

9 e^3. AND I HEREBY DECLARE, that my said trustees or trustee for the time being shall, and lawfully may, permit and suffer the said household furniture and household effects to be possessed and used by my said wife [*or*, daughter], in common with any husband of hers, in their dwelling-house for the time being (*a*).

After A.'s de-

9 e^4. AND from and immediately after the decease of my

As to gifts of chattels for separate use.

(*a*) [Where personal chattels are given for the separate use of a married woman, a trustee should always be interposed, in order to exclude the legal title of the husband, who might otherwise defeat the trust by delivering the property to a purchaser, &c., without notice; but the intervention of a trustee is not necessary to protect personal chattels given to a woman for her separate use from the execution of her husband's creditors: *Newlands* v. *Paynter*, 4 Myl. & Cr. 408.]

Reputed ownership of wife's separate chattels.

[Chattels subject to a trust for the separate use of a married woman, and in the joint possession of herself and her husband, will not pass to the assignees of the husband on his bankruptcy as being in his reputed ownership; *Ex parte Killick*, 3 Mon. D. & De G. 480; and if the husband, without his wife's assent, took possession of, and removed the furniture out of her reach, that would not place it in his "order and disposition with the consent of the true owner."]

said wife [*or*, daughter], I DIRECT my said trustees or trustee for the time being to be possessed of the said household furniture and household effects upon such trusts as my said wife [*or*, daughter] shall, while unmarried, by any deed or deeds, or, whether married or sole, by her last will and testament, direct or appoint; And in default of and subject to any such direction or appointment, IN TRUST for my said wife [*or*, daughter], her executors and administrators, absolutely.

cease, upon such trusts as she shall, while discovert, by deed, whether covert or sole, by will appoint.

In default, for her absolutely.

9 *f*. I GIVE to my wife, [*name*], during her life, for her sole and separate use, the use of my household furniture and other effects and things in and about my dwelling-house, garden, and premises, (money exceeding the amount of £25, securities for money, accounts, vouchers, documents and muniments of title, only excepted); AND I DESIRE that an inventory of the same articles be signed by my wife, and kept by my executors; and that my wife shall keep the said articles in good repair and condition, (reasonable wear only excepted), and insured against fire to the full value thereof, (such value to be assessed by my executors, or, if no executor, by my trustees or trustee), in some respectable office, in the names or name of my executors, or, if no executor, of my trustees or trustee, and deliver the receipts for each premium of insurance to my executors, or, if no executor, to my trustees or trustee, within one week after the same shall become payable; in default whereof, it shall be lawful for my executors, or, if none, my trustees or trustee, to repair or replace such of the said articles as shall be damaged, destroyed, or lost, or (as the case may be) to effect or keep on foot such insurance, and retain or recover the costs of such repairs, purchases, or insurance respectively, out of or by sale of any income, capital, or property given to my wife by my will. AND from and after the decease of my said wife, I GIVE the said articles to &c.

Effects in dwelling-house to wife for life;

—inventory;

—wife to repair and insure.

9 *g*[1]. I GIVE AND BEQUEATH all the books, plate, linen, china, and other household furniture and household effects of which I may be possessed at the time of my decease unto the said [*trustees*], their executors, administrators, and assigns, UPON TRUST that they the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, will permit and suffer my wife, [*name*], [*or*, daughter, [*name*], the wife of [*name*]], during her life, to have, use, and enjoy the said books and other effects to and

Household effects to trustees, for wife or daughter for separate use.

for her own sole and separate use and benefit, exclusively of [her said present or] any future husband, and without being in anywise subject or liable to his debts, control, interference, or engagements, and without being liable to make good any loss or damage that may arise by wear or tear, or fire, or any other inevitable accident, and with full power to the said trustees or trustee for the time being of my will to dispose of such part of the said books, plate, linen, china, and other household furniture and household effects, as, in the opinion of my said trustees or trustee for the time being, may become unfit for use, or unworthy of being preserved, and out of the proceeds of such sale or of my residuary estate to replace such of the said articles as shall be sold, damaged, or destroyed, with others of the like kind. (*Add ulterior limitation, as* (9 g^2)).

Effects to be sold after death of tenant for life.

9 g^2. And after the decease of my said wife [*or*, daughter], Upon trust that my said trustees or trustee for the time being will sell and dispose of the said books, plate, linen, china, and other the household furniture and household effects aforesaid, in such manner as they or he my said trustees or trustee for the time being shall think proper, and will stand possessed of the monies to arise by such sale or sales, upon the trusts hereinafter declared of and concerning the monies to arise from the residue of my personal estate and effects hereinafter bequeathed. (*Add direction as to inventory, and authority to determine what articles are included in the bequest,* (9c^2)).

Effects after death of tenant for life to be divided among children.

9 g^3. And after the decease of my said wife [*or*, daughter,] upon trust, that my said trustees or trustee for the time being will divide the said books, linen, china, and other household furniture and household effects, among such of my children as shall be living at the decease of my said wife, in such shares and proportions as my said trustees or trustee for the time being shall deem to be as nearly equal in value as may be. (*Add direction as to inventory, &c.* (9 c^2)).

Power for tenant for life to purchase.

9 *h*. I authorise and empower any person or persons for the time being entitled to the possession of the said articles of furniture and household effects to purchase the same from my trustees or trustee for the time being, at a valuation to be made by a respectable appraiser to be appointed by my said trustees or trustee [*or*, at the sum of £——], And I direct that the purchase-money for the same shall be added to my residuary personal estate.

Household effects for use of mother, bro-

9 *i*. I direct that all the household furniture and effects, and other things in and about my residence at the time of my

decease, (except gold and silver plate, money, securities for money, title-deeds, documents, accounts, and vouchers), shall be retained for the use of my mother and brothers and sisters, or such two or more of them as shall live together, and shall afterwards fall into the residue of my personal estate. AND I DIRECT, that my wines, liquors, and consumable stores shall be at the disposal of my said mother, brothers, and sisters, or such two or more of them as shall for the time being live together. AND, subject to the above direction for the use of my said household effects and things, and the above gift of my consumable stores, I BEQUEATH all my personal estate unto &c.

thers, and sisters, or such of them as shall live together.

Consumable stores for mother, brothers, and sisters, or such of them as shall live together.

9 *k*. I DIRECT my said trustees to permit my two daughters, [*names*], so long as they shall both continue unmarried and shall live together, and after the marriage or death of either of them, the other of them, so long as she shall continue unmarried, to have the use of all my household furniture and household effects not hereinbefore specifically and effectually disposed of, and the consumption, so long as they shall last, of my consumable household stores; And in case my said daughters, while both are unmarried, should cease to live together, or in case both of them should marry or die, THEN I DIRECT the said household furniture and household effects to be sold, and the produce thereof to be divided equally between my said daughters, their executors, administrators, or assigns; And in case either of my said daughters should die before me, and leave no child surviving me, then I GIVE the whole of the produce of such sale to my other daughter, her executors, administrators, and assigns.

Household effects for daughters while unmarried and living together;

—afterwards to be sold and divided.

9 *l*. AND I AUTHORISE AND EMPOWER my trustees or trustee for the time being, [after the decease or marriage of my said wife,] either to divide my books, furniture, and other household effects amongst my children living when such division shall be actually made, and the issue then living of any child or children then dead, whether of age or not, in such parts, shares, and proportions, and at such times and manner, as they or he shall think fit, or otherwise to sell all or any part thereof, and add the produce of such sale to my residuary personal estate hereinafter bequeathed, as my said trustees or trustee, in their or his uncontrolled discretion, shall think fit.

Authority to trustees to divide furniture, &c. among the children, or sell.

10 a^1. I GIVE AND BEQUEATH all the plate, books, book-cases, manuscripts, maps, bronzes, medals, sculptures, framed and unframed pictures, paintings, drawings, prints, and engravings

Plate, &c., as heirlooms, in strict settlement, where

there is no realty (*a*).

of which I shall die possessed, to my said wife and the said [*other trustees*], their executors, administrators, and assigns, [Upon trust, during the life of my wife, to permit and suffer the same to be used and enjoyed by her. And from and after her decease] Upon such trusts as shall or may, as nearly as the rules of law or equity will permit, correspond with and be similar to limitations of real estate, to the effect following, (that is to say): To the use of my eldest son during his life; With remainder To the use of his first and other sons successively, according to priority of birth, in tail male; With remainder To the like uses in favour of my second and every other son successively according to priority of birth, and their respective first and other sons successively, for life, and in tail male respectively; With remainder To the use of the first and other sons of my first son successively according to priority of birth, in tail general; With remainder To the use in tail general of the first and other sons successively, according to priority of birth, of my second and other sons successively as aforesaid; With remainder To the use of the daughter or daughters of my first son in tail, and if more than one, as tenants in common, with cross remainders in tail between or among them; With remainder To the like use or uses in tail in favour of the daughter or daughters of my second and other sons successively as aforesaid; With remainder To the use of my first and other sons successively according to priority of birth, in tail; With remainder To the use of my daughter or daughters in tail, and if more than one, as tenants in common, with cross remainders in tail between or among them; With remainder To the use of [*ultimate limitation*]; Yet so that the said trust premises, or any part thereof, shall not, for the effect or purpose of transmission, vest absolutely in any person or persons who would be tenant or tenants in tail male or general by purchase under such limitations as aforesaid, who shall not [being a male or males] live to attain the age of twenty-one years [or, being a female or females, live to attain the age of twenty-one years or marry]; But the issue who would be inheritable under such limitations shall not be excluded. (*Add clause* (10 *a*^{2})).

Not to vest in tenant in tail by purchase, before twenty-one [or marriage.]

Inventory.

10 *a*^{2}. And I direct an inventory to be made of the said plate, books, manuscripts, maps, bronzes, medals, sculptures,

(*a*) [The forms of bequests of chattels to go with settled real estate, will be found at the end of the forms of Devises in Strict Settlement.]

pictures, paintings, drawings, prints, and engravings, and that there shall be two copies of such inventory, both of which shall be signed by each tenant for life of the said trust-premises upon receiving possession of the said trust-premises, and one of which shall be kept by such tenant for life for the time being, and the other by my said trustees or trustee for the time being.

Another form of a gift of heirlooms, the vesting being protracted for the longest possible period.

10*b*. I BEQUEATH all my pictures, drawings, prints, statuary, antiquities, books, manuscripts, book-cases, jewels, gold and silver plate, minerals, fossils, specimens of natural history, Sevres, Dresden and ornamental china, and other articles of curiosity or vertù not otherwise specifically disposed of, unto my said trustees, their executors, administrators, and assigns, UPON TRUST that my trustees or trustee for the time being will, until the expiration of twenty-one years from the decease of the survivor of such of my issue as shall be living at my decease and the several persons mentioned by name in my will or any codicil thereto, suffer the said pictures and other articles to be possessed and enjoyed by my eldest son [*name*] and the other persons who from time to time would, for the time being, be my heirs in tail male, successively, during their respective lives, in the order of a descent in tail male; [And on failure of such issue within the period aforesaid, will, until the expiration of the said period of twenty-one years, suffer the said pictures and other articles to be possessed and enjoyed by the persons who from time to time would, for the time being, be my heirs in tail general, successively, during their respective lives, in the order of a descent in tail general;] And upon the expiration of the said period of twenty-one years, or upon failure of such issue in tail, (whichever shall first happen), I BEQUEATH the said pictures and other articles Unto the person [or persons] who shall then be entitled to the use and enjoyment thereof under the foregoing trusts, [and if more than one, as tenants in common]; or, if there be no such person, Unto (such child or children of the person who shall then last have been so entitled, as shall survive him, and if more than one, as tenants in common; And if there be no such child, Unto (*a*)) the executors or administrators of the person who shall then last have been so entitled, to be disposed of as part of his [or her] residuary estate, or

(*a*) [This parenthesis will be omitted if the trust for heirs in tail general is inserted.]

otherwise, as he [or she] shall [notwithstanding coverture] by any deed or will direct. I DIRECT my trustees or trustee to take from each person to whom the said pictures and other articles shall be delivered, an inventory thereof, signed by such person; AND I AUTHORISE my trustees or trustee for the time being, from time to time, on the request and at the costs of the person [or persons] who, for the time being, shall be entitled, under the trusts aforesaid, to the possession of any articles of furniture or plate, to dispose of the same by sale or exchange, and replace the same with other articles of the same kind and of equal value. AND I DECLARE, that no person who shall neglect to keep such of the same articles as are insurable, insured from damage by fire in the names or name of my trustees or trustee, shall thereafter be entitled to the possession thereof; But my trustees or trustee shall not be bound to see to such insurance.

Inventory.

Power to trustees to renew articles of furniture.

Heirlooms.

10 *c*. I GIVE all my gold and silver plate to my said trustees, IN TRUST to permit the same to be enjoyed as heirlooms with my capital messuage at ——, hereinafter devised in trust. PROVIDED, that, in case, and whenever, any tenant in tail entitled to the possession of the said messuage should die before the expiration of twenty-one years from the death of the survivor of my issue living at my death, the said heirlooms shall go over to the next taker of the said messuage.

Bequest of personal estate to wife (except

11. I GIVE AND BEQUEATH unto my wife, [*name*], absolutely, all my ready money (*a*), money in the hands of my banker,

---

Ready money, &c.

(*a*) ["Ready money" includes money at the testator's bankers: *Parker* v. *Marchant*, 1 Phil. 356; *Montresor* v. *Montresor*, 1 Coll. 693. And "money in hand which I may have for current expenses," has been held to pass dividends due on stock in the funds and money in the hands of an agent: *Vaisey* v. *Reynolds*, 5 Russ. 12. See *Glendening* v. *Glendening*, 9 Beav. 324.]

Securities for money.

["Securities for money" include Government stock, but not, it is presumed, Bank Stock, or other stock on which the dividends are variable: *Bescoby* v. *Pack*, 1 Sim. & Stu. 500; nor, it has been held, an I. O. U., which is merely an acknowledgment of a debt: *Barry* v. *Harding*, 1 Jones & L. 475—sed qu., for a bond, which is clearly a security for money, is nothing more than an acknowledgment of a debt under seal. And "property invested in British or foreign funds, bonds, or securities of any description," does not include canal or railway shares: *Hudlestone* v. *Gouldsbury*, 11 Jur. 464.

Legal estate in mortgage.

[It may be considered as settled, that the legal estate in a mortgage in fee will pass under a gift of securities for money, at least if the word "heirs" occurs in the limitation of the legatee's interest: *Ex parte Barber*, 5 Sim. 451; *Mather* v. *Thomas*, 6 Sim. 115; 3 Moo. & Sc. 684.]

goods, chattels, personal estate and effects, of what nature or kind soever and wheresoever (except monies in the public funds or upon Government or real securities), of which I shall be possessed, or to which I shall be entitled, at the time of my decease. AND I hereby, so far as I lawfully or equitably may or can, EXEMPT and DISCHARGE the personal estate so bequeathed to my said wife as aforesaid from the payment of my debts, funeral and testamentary expenses, and the several legacies (whether consisting of annual or gross sums) hereinafter by me given and bequeathed, [and from the legacy duty on such legacies as are given clear of duty].

money in the funds and real securities) discharged of debts and legacies.

12 *a*. I GIVE to my son [*name*], for his own benefit, such leasehold house or houses as, at the time of my decease, I shall occupy for residence or for business, with the appurtenances; And the tenant's fixtures, and the household and trade effects in and about the said house or houses, and the goodwill of my business or trade, and my stock in trade and trade accounts and writings, (subject to the use thereof by my executors); But not any trade debts: PROVIDED NEVERTHELESS, AND I HEREBY DIRECT, that my said son shall permit my said wife during her life (if my term and interest in such house should so long continue) personally to have the sole use and occupation of the apartments on the first floor of the said dwelling-house; And to have the free use in common with my said son, his executors, administrators, and assigns, of the kitchen, cellars, approaches, and other requisite and convenient parts of the said house and easements therein; And to have the exclusive use of such household effects as she shall select, leaving a fair proportion (to be ascertained, in case of dispute, by my said son's co-trustees or co-trustee) of such household effects for the use of my said son, both for domestic purposes and business.

Bequest of dwelling-house and business premises, with stock in trade, &c., subject to the right of widow to occupy certain apartments.

12 *b*[1]. I GIVE AND BEQUEATH unto my three sons [*names*], their executors, administrators, and assigns, absolutely, all my share and interest in the business of a ——, now carried on by me at ——, in partnership with [*partners*], and in the joint stock, property, credits, profits, and effects of the said partnership business, and all monies, debts, and arrears of profits which, at the time of my decease, shall be owing to me from the said co-partnership; [AND I NOMINATE AND APPOINT my said three sons, [*names*], to be my executors so far only as concerns my said share and interest in the said partnership

Share in partnership.

Special executorship.

business and property, and the said monies, debts, and arrears of profits so respectively bequeathed to them, and which I except from the general executorship of my estate hereinbefore constituted.]

Appointment of successors in partnership.

12 b^2. And, in pursuance and execution of the powers vested in me under or by virtue of the articles of agreement under which the said partnership business is carried on, and of all other powers and authorities me in this behalf enabling, I nominate and appoint my said three sons, [*names*], to be my successors in the said partnership business; And I hereby give to and vest in my said three sons all rights, powers, privileges, and authorities, which I am in anywise enabled to confer upon or repose in them as my successors in the said partnership business.

Stock in trade and goodwill.

12 c^1. I give and bequeath unto [*legatee*], his executors, administrators, and assigns, absolutely, all my stock in trade, And all the fixtures, machinery, plant, utensils, and effects, which at the time of my decease shall be used or engaged in my trade or business of a ——, And also the goodwill of the said trade or business, [And all my term and interest in the premises in which, at the time of my decease, the same trade or business shall be carried on,] And all policies of insurance from fire of the said stock in trade and other the premises lastly hereinbefore bequeathed, (But not any money or debts which shall be owing to me in respect of the said trade or business); [*or*, And also all book and other debts which at the time of my decease shall be owing to me in respect of the same trade or business, with all books of account, documents, vouchers, and writings relating to the said trade or business].

Exception of credits.

[Variation including credits and executorship in respect of them.]

12 c^2. And I appoint the said [*legatee*] to be my sole executor(*a*), so far only as concerns the said stock in trade, fixtures, machinery, plant, utensils, and effects, goodwill, [term and interest,] policies of insurance, [book and other debts,] and premises so bequeathed to him, To which stock in trade and other the premises so bequeathed to the said [*legatee*], I direct and declare that the general appointment of executors hereinbefore contained shall not extend.

As to appointment of special executor.

(*a*) [The utility of giving to a legatee of such things as trade debts, a legal title to sue for and recover them, and of exonerating the general executors from the trouble and responsibility of doing so, is obvious. But if there is any reason to fear that the general estate of the testator, exclusive of the trade credits, will not be sufficient for payment of his debts, it may be proper to associate the general executors with the legatees in the office, as in the form (12 c^3.)]

12 *c*[3]. AND I APPOINT the said [*legatee*] and [*general executors*] jointly to be my executors, so far only as concerns the said stock in trade, fixtures, machinery, plant, utensils, and effects, goodwill, [term and interest,] policies of insurance, [book and other debts,] and premises so bequeathed to the said [*legatee*]. Appointment of legatee to be executor as to legacy jointly with the other executors.

12 *d*. I GIVE to my son, [*name*], (with whom I have been for many years in partnership in the profession or business of an attorney, solicitor, and conveyancer), for his absolute use and benefit, all my share and interest in the law books, stationery, office furniture, and books of account, and also in the deeds, documents, papers, and writings, belonging to or in the custody of the said firm at the time of my decease. I ALSO GIVE to my said son, for his absolute use and benefit, all the deeds, documents, papers, and writings (including precedents and manuscript cases and opinions,) collected and accumulated by me in the course of my professional practice, or which shall be in my custody or possession on my sole and separate account at the time of my decease, subject nevertheless to the paramount right or claim (if any) of any other person or persons otherwise to regulate and dispose of the custody thereof. Share of law books, office furniture, papers, &c., to testator's son (with whom he was in partnership).

12 *e*. I GIVE AND BEQUEATH all my farming stock, growing and other crops (*a*), and all household and farming effects, and consumable stores and provisions whatsoever, which shall be in or about any freehold, copyhold, or leasehold house and farm, to which at the time of my decease I shall be entitled, and which shall then be occupied by me or any of my sons, or by any bailiff, servant, or other person, for my use, To the person who, at the time of my decease, shall first become entitled under the limitations of this my will to the house and farm in or about which the same shall be. Farming stock to devisee of farm.

12 *f*. I GIVE AND BEQUEATH unto [*legatee*], his executors, administrators, and assigns, for his and their absolute use and benefit, all the term, estate, and interest to which I shall be entitled at the time of my decease in the farm and premises at ——, now held by me under lease from ——, Esq., together with all the farming stock, both live and dead, growing and other crops, and household and farming furniture, utensils and effects, and consumable stores and provisions, which at the time of my decease shall be in, upon, or about the said farm and premises, and all policies of fire insurance on the said farm, stock, and other effects, or any part or parts thereof. Leasehold farm and farming stock.

(*a*) [Growing crops will not pass under the description of "farming stock:" *Vaisey* v. *Reynolds*, 5 Russ. 12.] "Farming stock."

Household goods to children equally.

13 *a*. I GIVE unto and equally among my children who shall be living at my decease the household furniture, plate, linen, china, glass, printed books, paintings and pictures, (except the said picture by Rubens), and household effects, of which I shall be possessed at the time of my decease; And if any dispute should arise respecting the division and appropriation thereof, I DIRECT that the effects lastly hereinbefore bequeathed shall be disposed of as part of my residuary personal estate.

Furniture, &c., to be sold in case of dispute as to division.

Bequest of household furniture, to be divided by executors.

13 *b*. I GIVE AND BEQUEATH to my two daughters, [*names*], all the wearing apparel, household furniture, plate and plated articles, linen, china, printed books, and household effects, and wines, liquors, fuel, and other consumable stores, of which I shall be possessed at my decease, equally to be divided between them, share and share alike, for their own absolute use and benefit; And if any dispute should arise respecting the distribution thereof, then I EMPOWER my executors, in their discretion, to distribute and apportion the said furniture and effects between my said daughters, in such manner as such executors shall think fair and proper.

Bequest of Government and real securities.

14 *a*. I GIVE AND BEQUEATH all and every the shares and sums of money in the public stocks or funds or other Government securities of Great Britain, or upon real securities, of or to which I shall die possessed or in any wise entitled, unto the said [*trustees*], their executors, administrators, and assigns, upon and for the trusts, intents, and purposes hereinafter declared concerning the same.

—Bank Stock and Long Annuities.

14 *b*. I GIVE AND BEQUEATH to [*legatee*], absolutely, the sum of £—— Bank Stock, of which I am now possessed; and also the sum of £—— Long Annuities, now standing in my name at the Bank of England.

Stock to be appropriated or purchased by trustees.

14 *c*. I GIVE AND BEQUEATH to the said [*trustees*] the sum of £—— Reduced Three Pounds per Centum Annuities, the same to be appropriated or purchased by them as soon as convenient after my decease (*a*), and to be held upon the trusts hereinafter declared, that is to say.

Suggestion as to stock legacies.

(*a*) In bequeathing stock legacies, it should be distinctly shown whether they are intended to be specific or general, or, in other words, whether the subject of gift is stock then belonging to the testator, or any stock that can be procured. The bequest in the text is evidently of the latter description; and, in general, the intention is best subserved by framing the legacy in this manner; because the making it specific subjects the testator to the necessity of altering his will at every change of his securities. Explicitness on the point is important to prevent litiga-

14 *d*[1]. I GIVE AND BEQUEATH to the said [*trustees*] the sum of £—— Reduced Three Pounds per Centum Annuities, now, on this —— day of ——, standing in my name in the books of the Governor and Company of the Bank of England (*a*). Specific bequest of stock.

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tion. If the legacy is to be specific, it should be expressed as in the form (14 *d*[1].)

(*a*) [Stock in the funds is not money; and legacies of stock, whether specific or general, are not properly within the description of "pecuniary legacies." Thus, where a testator directed that the duty on the pecuniary legacies given by his will should be paid out of his general estate, the direction was held not to apply to a general bequest of Consols: *Douglas* v. *Congreve*, 1 Keen, 410.] Legacies of stock are not pecuniary.

[The following list of the different British Funds may be useful. In describing such of the funds as are payable at the Bank of England, they are frequently described as "Bank" Annuities, to distinguish them from South Sea Annuities; but this is not an essential part of the description:— Enumeration of the British Funds.

1. "3*l.* per Centum Annuities, 1726." A small fund amounting to about 826,000*l.* Irredeemable—generally about 1*l.* per cent. lower in price than Consols. Dividends payable on the 5th of January and 5th of July.

2. "Consolidated 3*l.* per Centum Annuities." The fund used and authorised by the Court of Chancery for investments. Dividends payable on the 5th of January and 5th of July.

3. "Reduced 3*l.* per Centum Annuities." Dividends payable on the 5th of April and 10th of October.

4. "3*l.* 5*s.* per Centum Annuities." Dividends payable on the 5th of April and 10th of October. Created in 1844, by the 7 & 8 Vict. c. 4, s. 5, ("An Act for transferring 3*l.* 10*s.* per Centum per Annum Annuities, 1818, into Annuities of 3*l.* 5*s.* per Centum per Annum and New 3*l.* per Centum per Annum Annuities"), and the 7 & 8 Vict. c. 4, ("An Act for transferring certain Annuities of 3*l.* 10*s.* per Centum per Annum and Government Debentures into Annuities of 3*l.* 5*s.* per Centum per Annum and New 3*l.* per Centum per Annum Annuities"), out of the following funds, (and the corresponding Irish funds), which were paid off:—

3*l.* 10*s.* per Centum Annuities (1818).
3*l.* 10*s.* per Centum Reduced Annuities (1824).
New 3*l.* 10*s.* per Centum Annuities (1830).

The dividends on this stock will continue payable until the 10th of October, 1854, when the dividends will be reduced to 3*l.* per cent., and the stock will be called,

5. "New 3*l.* per Centum Annuities."

6. "New 5*l.* per Centum Annuities." Erected in 1830, by 11 Geo. 4, c. 13. Dividends payable on the 5th of January and 5th of July.

7. "Long Annuities," (expire in 1860). Payable on the 5th of April and 10th of October.

8. "Terminable Bank Annuities, 1859." (April and October).

9. "Terminable Bank Annuities, 1860." (January and July).

10. "Terminable Bank Annuities, 1867." (January and July).

11. "Terminable Bank Annuities, 1880." The last four funds are

Trust of stock legacy for maintenance of infant until twenty-one, and then to be transferred to him.

Trustee for maintenance not to inquire as to ability of infant's parents.

14 *d*[2]. UPON TRUST, from time to time, to apply the dividends arising from the said annuities in and towards the maintenance and education of my great nephew, [*name*], during his minority; and, immediately upon his attaining the age of twenty-one years, UPON TRUST to transfer the said annuities to the said [*name*] for his own use and benefit; And I DIRECT that the said trust for maintenance shall take effect, notwithstanding that the parents or parent of the said [*name*] shall be in circumstances enabling them to maintain and educate him; And in case the said [*name*] shall die during his minority, then I DIRECT that the said £—— Reduced ThreePounds per Centum Annuities shall sink into my residuary personal estate (*a*).

Authority to pay the income to the parent of infant.

14 *d*[3]. AND I AUTHORISE my trustees, if they think proper so to do, from time to time, to pay over the income of the said trust-fund to either parent of the said [*name*], to be applied for his maintenance as aforesaid; And in such case my trustees shall be exempted from all responsibility in respect of the application thereof.

Bequest of Bank Stock, shares, &c.

14 *e*. I GIVE AND BEQUEATH unto [*legatee*], his executors, administrators, and assigns, absolutely, all the Stock of the Governor and Company of the Bank of England, Stock of the East India Company, East India Bonds, South Sea Stock, capital stock or shares in the —— Insurance Company (but not any policy of insurance in the said Company on my own life or on the life or lives of any other persons), capital stock or shares in the Imperial Gas Light Company, debentures or bonds of the —— Railway Company, and Dutch Bonds, to

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more formally described as "Annuities for terms of years, ending the —— day of ———, 18——, (*as the case may be*), transferable at the Bank of England."

[The accounts of all the above-mentioned funds are kept at the Bank of England. Those of the four next mentioned at the South Sea House.]

South Sea funds.

12. "Old South Sea Annuities." Separated from the South Sea Stock in 1733. Dividends (3*l*. per cent.) payable on the 5th of April and 10th of October.

13. "New South Sea Annuities." Separated from the South Sea Stock in 1738. Dividends (3*l*. per cent.) payable on the 5th of January and 5th of July.

14. "3*l*. per Centum South Sea Annuities, 1751." Created to aid in reducing the other South Sea Annuities to 3*l*. per cent. Dividends payable on the 5th of January and 5th of July.

15. "South Sea Stock." A fixed dividend of 3*l*. per cent., payable on the 5th of January and 5th of July.]

(*a*) Sometimes a power is given to the trustees to pay the income to he parent instead of applying it themselves, as in the form (14 *d*[3].)

which I am now, on this —— day of —— (*a*), entitled, and also all arrears of dividends and interest thereon, and accre-

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(*a*) [The date of the instructions for the will. This is better than saying, "at the date of this my will;" upon which words a doubt has been raised whether they may not be extended, contrary to the intention, to the date of a codicil, by the terms of that codicil. The 24th section of the statute 7 Will. 4 & 1 Vict. c. 26, "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, *unless a contrary intention shall appear by the will*," has not yet received the benefit of many judicial comments. As some guide to the application of the concluding words of the enactment, it may be suggested, that where the words "of which I shall be possessed at the time of my death," or words of similar import, might be added to the gift without absurdity, and with the effect of extending its operation to property not belonging to the testator at the date of his will, the 24th section will apply; but where such an addition cannot be made without rendering the language which the testator has actually employed inappropriate or absurd, it will be considered that a contrary intention does appear by the will. Thus, if the testator gives "all my Long Annuities," "all the property I possess in the public funds," (as in *Cockran* v. *Cockran*, 14 Sim. 248, where such words in a will, made, it is presumed, before 1838, were held to refer to the date of the will), this will be referred, under the 24th section, to the term of the testator's death. But if the gift is of "my black horse," or "my house in Russell-square," or even "my farm in the parish of ——," (a gift of "my *estate*, in the parish of ——," might be open to a different construction), or, generally, if the subject-matter of the gift is described in a manner which imports that it is, at the date of the will, in existence as a thing known to and possessed by the testator, if, in short, it is *individualised*, then it must be held that the will does show an intention to exclude the operation of the 24th section. Thus, to borrow an illustration from a source not within the scope of the enactment in question, it is settled that a gift to "my children" will include children born after the date of the will; but a gift to my son Charles would not entitle another son, born after the death of the first Charles, and called by his name; for the gift, being to an individual, only one person could have been meant, and that one must have been the person then answering to the description. So, a gift of "my black horse," or "my house in Russell-square," is meant to pass a single horse or house, viz. the one then possessed by the testator; and the intent to pass that is inconsistent with an intent to pass a different one. This would be clear, if the testator, retaining the horse or house he had at the date of the will, should afterwards acquire others; the gift would not, it is conceived, be void for uncertainty, but would pass the horse or house which the testator had when he made his will. There is great difficulty, however, in applying the distinction in practice. And see 1 Jarm. on Wills, 289, where a more violent operation is attributed to the enactment in question. As to the force of the word "now," see *Doe* d. *York* v. *Walker*, 12 Mee. & W. 591; *Auther* v. *Auther*, 13 Sim. 422; *Cole* v. *Scott*, 12 Jur. 591.]

The time at which a will speaks, with reference to specific bequests.

tions thereto, which, at the time of my decease, shall remain unpaid.

Shares in a company.

Provision for ademption.

14*f*. I GIVE AND BEQUEATH to [*legatee*], absolutely, five of my original shares in the —— Company; And if I should not be possessed of so many shares at the time of my decease, I GIVE AND BEQUEATH to him, in lieu of each deficient share, the sum of £—— sterling.

Income of specific funds to widow for life.

14*g*. I GIVE to my wife, during her life, the income arising from the sum of £——, 3*l*. 5*s*. per Centum Annuities, now standing in my name, and also the income from £—— Long Annuities now standing in our joint names. AND I DIRECT that the said funds shall be kept in the joint names of my said wife (*a*) and my trustees or trustee for the time being.

Proviso in case of ademption.

PROVIDED, that if I should not possess the said several funds at my decease, my trustees or trustee shall set apart and invest upon the public stocks or funds, or on real securities in England or Wales, (but not in Ireland), a sufficient portion of the proceeds of my residuary real and personal estate, to produce the annual sum of £——; Such funds or securities to be kept in the joint names of my wife and my trustees or trustee, and the income therefrom to be received by or paid to my wife during her life. And in such case, and until such investment shall be made, I DIRECT that my said wife shall receive the said annual sum, or a proportional part thereof, out of my personal estate.

Policies of life insurance, &c.

15. I GIVE AND BEQUEATH unto [*legatee*], his executors, administrators, and assigns, absolutely, all policies of insurance on my own life [or any other life or lives] to which I shall be entitled at the time of my decease [for my own absolute use and benefit, and not as trustee or mortgagee or by way of security only], and all monies, bonuses, and additions secured by or to be received in respect of the same policies respectively. [AND I DECLARE, that any monies which shall become payable in respect of any of the said policies in my lifetime, and shall not be actually received by me, shall be included with them in this bequest.]

Special executorship.

AND I NOMINATE AND APPOINT the said [*legatee*] to be my sole executor, so far only as concerns the said several policies of insurance, and the monies, bonuses, and additions secured by or to be received in respect

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(*a*) [The effect of inserting the name of the legatee for life in the books at the Bank is to entitle her directly to receive the dividends, without the intervention of the trustees.]

of the same, and which I except from the general executorship of my estate hereinbefore constituted.

16 *a*. I GIVE AND BEQUEATH all my ready money, and money at my bankers, which I shall be possessed of at my decease on my own account, to [*legatee*]. AND I NOMINATE AND APPOINT the said [*legatee*] to be executor of my will, so far as concerns the money so bequeathed to him (*a*), but not as to any other part of my estate. AND AS TO THE RESIDUE of my personal estate, I NOMINATE AND APPOINT [*executors*] to be executors of my will. Ready money. Special executorship.

16 *b*. I GIVE AND BEQUEATH to [*legatee*] all the principal and interest monies which shall be owing to me at my decease on the bond of [*obligor*], which I now hold, and also the said bond (*b*). [AND in case there should not be owing on the said bond at my decease for principal, or principal and interest, the full sum of £——, I DIRECT that the deficiency shall be made up to the said [*legatee*] out of my personal estate.] Bond debt. Provision in case of ademption.

16 *c*. I GIVE AND BEQUEATH to [*legatee*], his executors, administrators, and assigns, absolutely, all the principal and interest monies, and costs actually paid or settled by me in my lifetime, which at the time of my decease shall be owing to me on a mortgage for the sum of £——, [and further advances,] made by [*mortgagor*] (*c*), and all terms of years, and Mortgage debt.

(*a*) [If the legatee can quietly obtain possession of the money, it will not be necessary for him to prove the will. The residuary executors will, of course, not be accountable if they permit him to take the money without proving; because their duty does not extend to that portion of the assets.]

(*b*) [A gift of a bond, or of the money owing on a bond, will, unless restrained by the context, carry arrears of interest due at the testator's death: *Harcourt* v. *Morgan*, 2 Keen, 274; *Kent* v. *Tapley*, 11 Jur. 940. And a bequest of a mortgage seems to admit of the same construction. But a bequest of the "sum of 200*l*." secured by a mortgage, or of "300*l*. due upon a bond," will not pass arrears of interest: *Roberts* v. *Kuffin*, 2 Atk. 112.] Arrears of interest on debt.

(*c*) [If the mortgage is of leaseholds, or for a term of years, say—

"And I ALSO GIVE AND BEQUEATH to the said [*legatee*], his executors, administrators, and assigns, all the hereditaments comprised in the said mortgage security, and all other securities for the said mortgage debt and interest, and all my term, estate, and interest therein respectively." Mortgage for years.

The usual addition, "subject to such equity of redemption thereof as may be subsisting," is superfluous.]

Special executorship.

other securities for the same. AND I NOMINATE AND APPOINT the said [*legatee*] to be my sole executor, so far only as concerns the said mortgage debt and interest, and the securities for the same, and which I except from the general executorship of my estate hereinbefore constituted (*a*). (*Add devise of mortgage estate,* 16 *d*).

Devise of mortgage estate to legatee of debt.

Power of appointment.

16 *d*. AND I GIVE, DEVISE, AND APPOINT (*b*) all and singular the hereditaments, whether of freehold or of copyhold or customary tenure, on which the said mortgage debt is, or, at the time of my decease, shall be secured, To SUCH USES as the said [*legatee*], his executors or administrators, shall, at any time or times before the expiration of twenty-one years from his decease, by any deed or deeds, or will, appoint; And, subject thereto, I GIVE, DEVISE, AND BEQUEATH the said hereditaments, and all other securities for the said mortgage debt, unto the said [*legatee*], his heirs, executors, administrators, and assigns, for his and their own use and benefit, but subject to such equity of redemption as may be subsisting in respect thereof (*c*).

Bequest of mortgage debt and devise of mortgage estate.

16 *e*[1]. I GIVE AND BEQUEATH, unto my grandson, [*name*], all that principal sum of £—— secured by indentures of lease and release and mortgage, bearing date respectively on or about the —— and —— days of ——, and all arrears of interest which shall be due thereon at the time of my decease; And for the better enabling my said grandson to receive the said mortgage debt, I GIVE AND DEVISE all the lands and hereditaments situate in the parish of ——, in the county of ——, in and by the said indentures assured to me and my heirs for securing the same; And all other hereditaments which shall be vested in me as a security for the said debt, To SUCH

(*a*) [Vide ante, p. 454, n.]

(*b*) [Modern mortgages, especially of copyholds, frequently contain powers of appointment. The word "appoint" will be harmless, if it should turn out that there is no such power in the devised security.]

As to giving legatee a power of appointment.

(*c*) [The legal dominion over the mortgage securities is thus made to accompany the debt, and to be exercisable in the most convenient mode, viz. by appointment. Where copyholds are included in the security, and the fines on admissions are heavy, such a power is very useful, as it enables the owner of the security to transfer it to a mortgagee or purchaser, or to revest the lands in the mortgagor without incurring the expense of an admittance.]

[The above form will be applicable where there are copyholds, whether the surrender contains a power of appointment or not. By devising the copyholds, the risk of the legal title to admittance vesting in an infant heir is avoided.]

USES as the said [*grandson*], his executors or administrators, shall, at any time or times, before the expiration of twenty-one years from his decease, by any deed or deeds, appoint; And, subject thereto, UNTO AND TO THE USE of the said [*grandson*], his heirs and assigns for ever, subject, nevertheless, to such equity of redemption, if any, as may happen to be subsisting under or by virtue of the same indentures of mortgage (*a*).

Substitution of a pecuniary legacy in case of the mortgage being paid off in the testator's lifetime.

16 *e*[2]. AND in case the said mortgage debt of £——, or any part thereof, should be paid off in my lifetime, then, in lieu thereof, I GIVE to the said [*grandson*] the sum of £——, or such smaller sum as shall be equal to the amount so paid off, to be paid to him out of my general personal estate.

Bequest of bond debt owing from son-in-law to obligor's wife.

17 *a*. I GIVE AND BEQUEATH to my daughter [*name*], wife of [*husband*], of &c., the sum of £——, now owing to me upon the bond of the said [*husband*], and all interest which may happen to be due thereon at the time of my decease, for her absolute use and benefit (*b*).

Legacy to be deducted from debt.

17 *b*. I GIVE to my son [*name*] the sum of £——, to be paid by deduction out of any money he may owe me at my decease; and if his debt to me should be paid off or reduced below that sum at my decease, then the said legacy or the residue thereof (as the case may be) shall be paid to him out of my personal estate (*c*).

Legacy. Bond debt to go in satisfaction of it.

17 *c*. I GIVE AND BEQUEATH to [*legatee*] the sum of £——; And I DECLARE that the sum of £—— by me lent to him, on his bond, or so much thereof as shall remain unpaid at my decease, shall be released to him in part satisfaction of this legacy, but that he shall not be accountable for any arrear of interest due at my death, nor shall any such arrear go in re-

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(*a*) It is obviously convenient that the estate and the debt should become vested in the same person, in order to avoid the necessity of the legatee obtaining a conveyance of the legal estate from the testator's trustees, who are made the general devisees of his mortgage estates. If the mortgage debt should be paid off in the testator's lifetime, the legacy would be adeemed. Sometimes a testator provides against this event, as in the form (16 *e*[2].)

Choice of husband or wife as legatee.

(*b*) The debt is given to the daughter instead of being forgiven to the husband, in order to avoid the 10*l*. per cent. legacy duty, agreeably to a suggestion, ante, Vol. 9, p. 828. This object should not be lost sight of in framing other gifts of personal property.

(*c*) [This legacy will of course be subject to the provision in the Wills Act as to lapse &c., (ante, p. 219), if the son die before the testator, leaving issue surviving the testator.]

duction of his said legacy; And I DIRECT that the said bond shall be delivered up to be cancelled (*a*); And in case he die before me, I release his estate from the amount that shall be due on the said bond.

Release of debt.

17 *d*. I RELEASE the debt of £—— and interest owing to me by [*debtor*] on his bond, whether he survive me or not (*b*).

Bequest of amount of debt to debtor.

17 *e*. I GIVE AND BEQUEATH to [*debtor*] the amount of the principal and interest money which, at my decease, shall be owing from him to me, on the mortgage security now held by me.

Bequest of testator's share of residue under the will of his father-in-law to trustees.

18 *a*[1]. AND WHEREAS, under or by virtue of the will of [*wife's father*], late of ——, deceased, I am entitled (after payment of the said testator's debts, and funeral and testamentary expenses, and certain pecuniary legacies and annuities thereby given) to one-fourth part of the monies arising from and to be produced by the sale of the real and personal estates of the said testator: Now, I HEREBY GIVE AND BEQUEATH the said one-fourth part or share, and all my right,

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Lapse in case of forgiveness of a debt.

(*a*) [Where the testator released and forgave to A. B. the sum of £500 owing on his bond, and directed the bond to be delivered up to him to be cancelled, it was held that the will did not import a general release; and that the benefit of the release lapsed by the death of the legatee before the testator: *Izon* v. *Butler*, 2 Price, 34.]

(*b*) [The concluding words are explanatory, but not essential. A testamentary release of a debt in general terms (see *Izon* v. *Butler*, 2 Price, 34; *South* v. *Williams*, 12 Sim. 566) will operate, although the debtor should not survive the testator, except, it seems, in the case of one of two or more joint debtors, when it is construed as a legacy to that one, and will lapse by his death: *Izon* v. *Butler*, 2 Price, 34; *Maitland* v. *Adair*, 3 Ves. 231. But a mere gift of the amount of the debt to the debtor, without words of release, and perhaps even a release, if only to the debtor by name, is subject to lapse. (*Sibthorp* v. *Moxam*, 3 Atk. 579; *Elliott* v. *Davenport*, 1 P. Wms. 83; *Toplis* v. *Baker*, 1 P. Wms. 86). But a testamentary release of a debt is inoperative at law, and even in equity is subject to the claims of the testator's creditors. It is advisable, where such a course is consistent with the testator's policy, to release the debt by an instrument taking effect in his lifetime, which release will be effectual at law, and will exempt the amount of the debt from probate and legacy duty.]

As to abatement where debt is released.

[Where a testator gives to his debtor the amount of the debt, that is a pecuniary legacy, liable to abatement if the assets are deficient. But a release of the debt in express terms, as it is not liable to lapse, is not, it is conceived, subject to abatement. It is a specific gift.]

title, and interest therein and thereto, to the said [*trustees*], their executors or administrators, UPON TRUST, &c.

18 *a*[2]. AND I DECLARE, that my executors [trustees or trustee for the time being] shall have full power to adjust, settle, and compromise with the executors of the said [*wife's father*] all accounts, questions, and disputes (if any) relating to the said one-fourth share hereinbefore bequeathed, either by a reference to arbitration or in such other manner as my said executors [trustees or trustee for the time being] in their [or his] uncontrolled direction shall think proper; And also to give full and complete releases and discharges to the said executors of the said [*wife's father*] in respect thereof. And I DECLARE that my said wife shall be entitled to the interest, dividends, and annual income accruing from or in respect of the said one-fourth part or share, from the day or time of my decease until the actual payment or receipt thereof. AND in case the said one-fourth part or share hereinbefore bequeathed in the proceeds of the said real and personal estates, or any part thereof, should be received by me in my lifetime, then I GIVE AND BEQUEATH to the said [*trustees*], their executors and administrators, a sum of money equal to the sum or amount so received, upon such and the same trusts, and to and for such and the same trusts, intents, and purposes in all respects, as are hereinbefore expressed concerning the monies arising from the said one-fourth part or share hereby bequeathed, such legacy or sum of money to be appropriated as soon as convenient after my decease, and to bear interest at the rate of 4*l.* per centum per annum from the day of my decease.

Power to executors to settle accounts with executors of testator's father-in-law.

Destination of income of bequeathed residue.

In case bequeathed share should be received in testator's lifetime, bequest of equal sum of money on similar trusts.

19 *a*. I DIRECT my trustees or trustee for the time being to set apart or purchase the sum of £—— Three pounds per Centum Annuities, and to pay the dividends thereof by clear weekly payments of £—— to [*name*] [*or*, to set apart and invest a sufficient fund to produce by the income therefrom the clear weekly sum of £——, and to pay the same weekly to [*name*],] until his decease, or until he shall assign the same, or commit or suffer any act or default whereby his interest in such dividends would, if it were to continue, become vested in or transferred to his assignees in bankruptcy or insolvency, or any other person or persons; AND, after the determination by any means of the interest of the said [*name*] in such dividends, I DIRECT that the said fund shall form part of my residuary personal estate; And I DIRECT that such weekly payments

Weekly payment to A. B. during his life, to cease on alienation.

shall commence from my decease, and until such fund be appropriated shall be made out of the income or capital of my general personal estate or out of the income from any of my real estates, and shall be clear of legacy duty.

Direction to purchase annuity.

19 *b*. I DIRECT my executors, as soon as convenient after my decease, to purchase an annuity of £—— sterling, or two annuities of half that amount, (clear of legacy duty and all other incidental expenses and deductions), for [*name*], during his natural life; Such annuity or annuities to be purchased either from Government or from one of the public offices or companies concerned in granting annuities, or upon good real security from some private person or persons, as my executors shall deem expedient; And in case a Government annuity is not purchased, a proper provision to be made for the apportionment of such annuity up to the day of the decease of the said annuitant (*a*). AND I DIRECT, that, until such purchase

Until purchase,

As to authorising the purchase of annuities.

(*a*) [It is sometimes convenient to provide for annuities in the manner here suggested, in order to avoid keeping open the accounts and the final distribution of the general estate, which otherwise is suspended during the continuance of the annuity. See the form where the income of the residue is given to a legatee for life, subject to the payment of annuities which may or may not endure beyond the life, (21 *a*[5].), p. 484. It is to be observed, that a Government annuity is not apportionable on the death of the annuitant in the interval between two half-yearly days; but a quarter of a year's payment is to be made on the next half-yearly day after such death, whether more or less than a quarter shall then have elapsed. By purchasing two annuities of half the amount, payable on the alternate half-yearly days, an approximation to an apportionment may be secured.]

Government annuities.

[The Commissioners for the Reduction of the National Debt were originally empowered to grant life annuities by the stat. 48 Geo. 3, c. 142. This act, and several auxiliary acts subsequently passed, were repealed by the 9 Geo. 4, c. 16; and the granting of Government annuities is now regulated by the stat. 10 Geo. 4, c. 24, (amended by the 2 & 3 Will. 4, c. 59, and 1 & 2 Vict. c. 49). The principal act authorises the Commissioners for the Reduction of the National Debt, at such days and times as they shall from time to time appoint by notice in the London Gazette for that purpose, to accept transfers of stock, or receive money for the purchase of annuities on single lives, or on the continuance of two lives and the life of the longest liver of them, or on the joint continuance of two lives, such annuities to commence respectively either immediately or at a period to be fixed at the time of granting any annuity; and also to sell and grant deferred annuities upon the continuance of a single life or joint lives, and also to sell and grant annuities to continue for any certain limited term of years, to commence either immediately or on any day to be named at the time of granting such annuity; and also to sell and grant generally any immediate annuities, or any temporary annuities,

10 Geo. c. 24.

shall be made, the said annuity shall be paid out of my general personal estate in equal portions quarterly, the first of such quarterly portions to be paid at the expiration of three

annuity to be paid out of general personal estate.

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or any deferred annuities, of whatever kind or denomination, in the manner and under the regulations expressed in the act.]

[No annuity is to be granted on the life of a nominee under fifteen years, and the Commissioners, or their Comptroller, may, in other cases, decline, on such grounds as they may think sufficient, to grant any annuity.]

[Annuities may be purchased by the transfer, in specie or value, of not less than 100*l.* Consols, and deferred annuities by annual payments of not less than 5*l.*]

Evidence on which annuities are granted.

[Before completing the purchase, the purchaser, or some one on his behalf, must sign a declaration, stating the name of the purchaser, and the name or names of the person or persons for whose life or lives the annuity is to be granted, and such other particulars as the Commissioners shall require, and must produce a copy of the register of the birth or baptism of the nominee, or of each of the nominees, certified by the minister, or, in his absence, by two of the churchwardens or chapelwardens or overseers of the parish or place of registry, to be attested by two witnesses, with an affidavit by the witnesses, or one of them, verifying the copy and certificate, and a solemn declaration of identity by the purchaser or some one on his behalf; and if the day of birth is not named in the register, the annuity is to be calculated from the day of baptism. In the absence of a certificate of registry of birth or baptism a declaration as to age, parentage, &c., is to be produced, which declaration (when the nominee is a native of the United Kingdom) must explain the absence of the certificate of registry.]

Tables.

[The amount of annuities to be granted for every 100*l.* of stock is regulated by tables published by the Commissioners of the Treasury, and the current price of stock. These tables, and blank forms, may be procured at the National Debt Office, Old Jewry.]

Annuities payable half-yearly.

[The annuities are to be made payable half-yearly, on the 5th of January and 5th of July, or the 5th of April and 10th of October, according to the time of purchase; i.e. the first payment is to be on the 5th of January for all purchases completed by transfer or payment of the consideration at any time during the quarter ending on the preceding 10th October, and so on. And on the determination of a life annuity, a quarter of a year's annuity is to be paid on the half-yearly day next succeeding the day of the death by which the annuity is determined, if claimed within two years (sect. 22).]

Quarter's payment on death of nominee.

[No bargain for an annuity is to be made within fourteen days after any 5th of January, 5th of April, 5th of July, and 10th of October, (sect. 23).]

Evidence for payment of annuity.

[Half-yearly payments to be made on production of certificate by minister, or, in his absence, by churchwardens, chapelwardens, or overseers, or of a justice of the peace, or of the governor of the colony or the consul where the nominee resides, that he is alive, with a declaration verifying the certificate, or on the personal appearance of the

calendar months from the time of my decease, and shall be made good up to the day from which the purchased annuity shall commence. And I declare, that the said [*annuitant*] shall not, nor shall his personal representatives, in case of his dying before the said annuity shall have been purchased, be entitled to elect to receive the price or value of the said annuity in lieu of the annuity hereinbefore directed to be purchased, any rule of equity to the contrary thereof notwithstanding (*a*).

Annuitant not to elect to receive value of annuity.

Annuity to be paid out of income of a fund.

19 *c.* I direct my trustees or trustee, out of the income from the said trust-funds, to pay an annuity of £——, clear of legacy duty (*b*) and all other incidental expenses and de-

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nominee before the proper Government officer, who is to be satisfied of his identity, (sect. 24).]

Annuities transferable.

[These annuities are transferable at the Bank without payment of any stamp duty, (sects. 32 to 38).]

1 & 2 Vict. c. 49.

Certificate of Registrar of Births, &c.

[(By the 1 & 2 Vict. c. 49, s. 14, the certificate of the Registrar-General of Births, attested by two witnesses, and verified by the declaration of one of the witnesses, and a declaration of identity, is made sufficient evidence for the purposes of the former act).]

[By the 3 & 4 Will. 4, c. 14, amended by 7 & 8 Vict. c. 83, ss. 8, 9, facilities are afforded to the purchase of Government annuities not exceeding 30*l.* by depositors in savings' banks, or persons whom the trustees of any savings' bank shall think entitled to become depositors. Such annuities are not transferable, except in case of bankruptcy or insolvency. The grant of an annuity of 30*l.* or less to a married man or woman, will not disable his or her wife or husband to purchase a like annuity.]

Legatee's right to take the value of an annuity directed to be purchased.

(*a*) This clause is inserted with a view to guard against the doctrine which entitles a person for whom an annuity is directed to be purchased, as in the text, to elect to take the price or value instead of the annuity. The same right vests in his representative, if the legatee happens to have died before the purchase, and who, of course, declares his election to receive the price; and thus the gift becomes changed into a very different species of bounty from what the testator intended: *Dawson* v. *Hearn*, 1 Russ. & Myl. 606. See also *Yates* v. *Compton*, 2 P. W. 308; *Barnes* v. *Rowley*, 3 Ves. 305; *Bayley* v. *Bishop*, 9 Ves. 6; *Palmer* v. *Craufurd*, 3 Swanst. 482; *Brown* v. *Ross*, cit. 1 Russ. & Myl. 607; *Woodmeston* v. *Walker*, 2 Russ. & M. 197.

As to exempting life annuities and other life interests from legacy duty.

(*b*) Annuities should generally be given free from legacy duty, because, the legatees having no capital out of which it is payable, the impost is necessarily thrown on the income, which it diminishes during the first four years from its commencement—possibly the whole period of its continuance. [The duty, when it is not charged on the residue, is to be deducted by equal instalments from the first four annual payments of the annuity, so that, if the annuity should endure only for a few years, the testator's estate is relieved, and the object of his bounty burthened in a disproportionate degree. Vide ante, Vol. 9, p. 742.]

[It is not usual to provide for the payment of the legacy duty on a life interest in a personal fund or residue, though it is obvious that

ductions, to my sister [*name*], during her life, for her separate and inalienable use, by quarterly payments, on such quarter days as shall be most convenient with regard to the investments of the said trust-funds, the first payment to be made within three calendar months from my decease, and to be proportional to the time which shall then have elapsed, and a proportional part to be paid to her executors or administrators for any fraction of a quarter immediately preceding her decease; AND, subject thereto, to pay the sum of £—— to each child of my said sister [*name*] who shall attain the age of twenty-one years, or marry; and to such child or children of each child of my said sister dead at my decease, as shall survive me, and attain the age of twenty-one years, or marry; if more than one, in equal shares.

Legacies to sister's children or their issue.

19 *d.* I GIVE AND BEQUEATH to [*annuitant*], an annuity of £——, during her life, clear of legacy duty and all other incidental expenses and deductions [for her sole and separate use (*a*)]; And I DIRECT my said trustees or trustee to purchase such annuity in the name of the said [*annuitant*], either from some private person or persons, and on adequate freehold, copyhold, or leasehold security, or from Government or some public company; and if from Government, to purchase the same in two equal portions so as to be payable quarterly; and if not from Government (*b*), to stipulate for the payment thereof quarterly, and with a proportional part to the day of the decease of the said [*annuitant*]; and in the meantime to pay the said annuity quarterly, out of my general personal estate, on the usual days for payment of Government annuities, the first payment to be made on the first of such days which shall happen after my decease, and to be proportional

Annuity to a woman for her separate use;

—to be purchased by trustees;

—so as to be payable quarterly.

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where a legacy is given to be enjoyed by several persons in succession, who are not chargeable with duty at the same rate, (see 36 Geo. 3, c. 52, s. 12; ante, Vol. 9, p. 744), the legatee for life is as fit an object for such a provision as an annuitant.]

(*a*) [The annuity is directed to be purchased in the annuitant's own name; but this will not prevent a trust for her separate use being effectual. But a provision against alienation would not be effectual, at least in the case of a Government annuity not purchased through the medium of a savings' bank; for no notice of the trust can be entered on the Government books. For a provision against alienation, see the next form.]

As to annuities for separate and inalienable use.

(*b*) [It is, in general, proper to give the trustees an option to purchase elsewhere than from Government; because it is sometimes extremely difficult, if not impossible, to comply with the rules as to proof of age, &c., which are strictly enforced in granting Government annuities.]

to the time which shall then have elapsed from my decease; PROVIDED ALWAYS, AND I HEREBY DIRECT, that the said [*annuitant*] shall not be entitled to receive the value of the said annuity in lieu thereof.

Annuitant not to take the value.

Annuity to be purchased by and in the names of trustees, in trust for separate and inalienable use of A.

19 *e.* I DIRECT my said trustees or trustee for the time being, to purchase an annuity of £—— for the life of [*annuitant*], clear of the legacy duty and all other incidental expenses and deductions, in their or his names or name, to be held IN TRUST for the said [*annuitant*], for her sole, separate, and inalienable use, and to be purchased either from some private person or persons, and on adequate freehold, copyhold, or leasehold security, or from Government or some public company; and if purchased from Government, to be purchased in two equal portions, so as to be payable quarterly; and if not purchased from Government, to be made payable quarterly, and with a proportional part to the day of the decease of the said [*annuitant*]; and in the meantime I direct my said trustees or trustee for the time being to pay the said annuity quarterly, out of my general personal estate, on the usual days for payment of Government annuities, the first payment to be made on the first of such days which shall happen after my decease (*a*), and to be proportional to the time which shall then have elapsed from my decease; PROVIDED ALWAYS, AND I HEREBY DIRECT, that the said [*annuitant*] shall not be entitled to receive the value of the said annuity in lieu thereof (*b*).

Annuitant not to receive value.

Annuity (not exceeding £30) to be purchased through a savings' bank.

19 *f.* I GIVE AND BEQUEATH to [*annuitant*] an annuity of 30*l.* during his life, clear of legacy duty and all other incidental expenses and deductions; And I DIRECT my said trustees or trustee to purchase such annuity in the name of the said [*annuitant*], and, if possible, of Government, through the medium of a savings' bank, so as to secure for the said [*annuitant*] an inalienable (*c*) provision during his life; and if they cannot so purchase the said annuity, then to purchase

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Annuity commences from testator's death.

(*a*) [An annuity given by will commences from the testator's death, although, as in the case of other legacies, payment is not demandable from the executors until the end of the first year: *Houghton* v. *Franklin*, 1 Sim. & Stu. 390; *Stamper* v. *Pickering*, 9 Sim. 176. But see *Storer* v. *Prestage*, 3 Mad. 167, which suggests the propriety of an express declaration as to the time from which the annuity is to be computed.]

(*b*) [But for this declaration, the annuitant, if discoverte, might elect to take the value of the annuity.]

(*c*) [Inalienable, except by bankruptcy or insolvency. Vide ante, p. 468.]

the same either from some private person or persons, and on adequate freehold, copyhold, or leasehold security, or from Government in the ordinary way, or some public company; and if not from Government, to stipulate for the payment thereof quarterly, and with a proportional part to the day of the decease of the said [*annuitant*]; and in the meantime to pay the said annuity quarterly, out of my general personal estate, on the usual days for payment of Government annuities, the first payment to be made on the first of such days which shall happen after my decease, and to be proportional to the time which shall then have elapsed from my decease; PROVIDED ALWAYS, AND I HEREBY DIRECT, that the said [*annuitant*] shall not be entitled to receive the value of the said annuity in lieu thereof.

Annuities to several.

19 *g*. I GIVE to A. B. an annuity of £—— during her life; To C. D. an annuity of £—— during her life; And to E. F. an annuity of £—— during her life; each of the said annuities to be for the sole, separate, and inalienable use of the said legatee thereof. I DIRECT my trustees or trustee to set apart or purchase, in their or his names or name, sufficient equal sums of the Consolidated and Reduced Three per Centum Annuities to satisfy the said annuities, by equal quarterly payments, clear of legacy duty and all other incidental expenses and deductions; and in the meantime to pay such annuities out of my general personal estate; the first quarter's payment of each such annuity to be made in full on the first day for the payment of dividends of either of the said funds which shall occur after my decease, (from the quarter day preceding which day of payment such annuity is to be deemed to commence) (*a*); and the last payment of each such annuity to be made in full on such one of the said dividend days as shall first occur after the decease of each such annuitant respectively (*b*).

Funds to be set apart to pay annuities.

Direction as to commencement and termination of annuities.

(*a*) [As to the necessity for this parenthesis, see *Irvin* v. *Ironmonger*, 2 Russ. & Myl. 531.]

(*b*) [This is in lieu of a provision for the payment of a proportional part of the annuity.]

[When an annuity, not directed to be paid in advance, is given for the separate use of a married woman, who is not maintained by her husband, it is apportionable on her death: *Howell* v. *Hanforth*, 2 W. Bl. 1016; *Anderson* v. *Dwyer*, 1 Sch. & Lef. 301. So, if the annuity is for the maintenance of an infant: 1 Swanst. 349, n. The stat. 6 & 7 Will. 4, c. 22, seems not to extend to annuities which *cease* at the time when the apportionment is required.]

Annuity to A. B. for her separate use.

19 *h*. I GIVE AND BEQUEATH unto [*annuitant*] an annuity or yearly sum of £—— sterling, during her life, for her sole and separate use, free from the control, debts, and engagements of any husband, and without power of alienation or anticipation, to be paid by equal quarterly payments, clear of legacy duty and all other incidental expenses and deductions, on the 5th day of January, the 5th day of April, the 5th day of July, and the 10th day of October in each and every year during her life; And a proportional part of such annuity to be paid to the said [*annuitant*], if living, on the first of such days that shall follow my decease, in respect of the period between such day and the day of my decease; And a proportional part of such annuity to be paid to the executor or administrator of the said [*annuitant*] immediately after her decease, in respect of the period between the day of her decease and the last preceding day of quarterly payment, or, if no such day shall have arrived, the day of my decease.

Apportionment.

Annuities to nephews and nieces.

19 *i*[1]. I GIVE to each of my nephews and nieces, [*names*], an annuity of £——, during his or her life, clear of legacy duty and all other incidental expenses and deductions, to commence from my decease and be paid half-yearly, with a proportional part or proportional parts to complete the period from the day of my decease to the day of his or her decease.

19 *i*[2]. I DIRECT my trustees or trustee to set apart a sufficient fund of Three Pounds per Centum Annuities for the payment of each of the annuities hereby given, [*or*, of the said annuity]; After which appropriation, the residue of my estate shall be exonerated from all liability in respect of such annuities, [*or*, of the said annuity]; And, subject thereto, the said fund shall form part of my residuary estate.

Direction to appropriate stock for payment of annuity.

19 *k*. I DIRECT my executors to purchase or appropriate the sum of £—— Three Pounds per Centum Annuities, and to pay the dividends (*a*) therefrom to [*annuitant*], during her life, [for her sole and separate use, free from the control, debts, and engagements of any husband, and without power of alienation or anticipation.] AND I DIRECT, that, until such purchase or appropriation, the yearly sum of £—— shall be paid

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Difference between an annuity and a life interest in a legacy not specific.

(*a*) [This is, in substance, a bequest of a life annuity; but as the income from the fund does not determine with the annuitant's life, no provision for apportionment is necessary. The difference, in general, between a gift of an annuity or of a specific fund, and a gift of a life interest in a fund directed to be appropriated, is, that, under the latter gift, the legatee for life receives no income in respect of the first year: *Gibson* v. *Bott*, 7 Ves. 96.]

to her in full out of my personal estate, in equal half-yearly portions, the first payment to be made in full on the second of the usual days for the payment of dividends on the public stocks or funds which shall occur after my decease. AND I DIRECT, that, at the decease of the said [*annuitant*], the said sum of £—— Three Pounds per Centum Annuities shall form part of my residuary personal estate. AND I FURTHER DIRECT that the legacy duty on the life interest so bequeathed to the said [*annuitant*] shall be paid out of my residuary personal estate.

Annuities to several.

19 *l*[1]. I GIVE AND BEQUEATH unto my sister, [*name*], an annuity of £—— sterling, during her life, clear of legacy duty and all other incidental expenses and deductions. I ALSO GIVE unto my niece, [*name*], an annuity of £—— sterling, during her life, clear of legacy duty and all other incidental expenses and deductions. [I ALSO GIVE &c. [*other annuities*].]

Trustees to appropriate funds for payment of annuities quarterly.

19 *l*[2]. AND I HEREBY DIRECT that my said trustees or trustee for the time being shall, as soon as conveniently may be after my decease, appropriate and set apart sufficient funds wherewith to pay and satisfy the said several annuities quarterly (which said funds, so to be appropriated and set apart, shall, subject to the payment of the said several annuities, be considered as part of my residuary personal estate); And shall in the meantime pay the same annuities quarterly, on the respective days on which the annual produce or income of or from the several funds so to be appropriated shall be payable, out of my general personal estate, the first quarterly payment to be made on such of the said days as shall first happen after my decease, and to be proportional to the time which shall then have elapsed from the day of my decease; and such quarterly payments to be continued out of my general personal estate, until such funds shall be so appropriated and set apart as aforesaid: PROVIDED ALWAYS, AND I HEREBY DIRECT, that the said annuities respectively hereinbefore bequeathed shall be for the sole and separate use of my said sister and niece respectively [*or*, of such of the said annuitants as are females respectively], free from the control, debts, or engagements of any husband, and without power of alienation or anticipation during any coverture or covertures. AND I FURTHER DIRECT, that if either [any] of them the said [*annuitants*] when not under disability (*a*),

Annuities to be for separate use of female annuitants.

Proviso for cesser on alienation, (appli-

(*a*) The established doctrine is, that a feme covert may be restrained from alienation without any clause of cesser; but a person not under coverture, whether man or woman, cannot.

As to restraints on alienation.

cable to male or female annuitants).

should assign, dispose of, or otherwise part with or incumber, at law or in equity, the annuity hereinbefore by me bequeathed to her or [him], or any part of her [or his] right or interest therein, or any unaccrued payment thereof, or in case her [or his] said annuity respectively should become vested in or liable to be disposed of by any person or persons whomsoever, other than the said annuitant to whom the same is hereby bequeathed, then, and in every such case, the said annuity with respect to which the same shall happen shall immediately thenceforth cease, determine, and be absolutely void, to all intents and purposes whatsoever.

Annuities to several.

19 *m.* I GIVE AND BEQUEATH unto A. B. an annuity or yearly sum of £——, during his life. I GIVE AND BEQUEATH unto C. D. an annuity or yearly sum of £——, during her life, for her sole, separate, and inalienable use during any coverture. I GIVE AND BEQUEATH unto E. F. an annuity or yearly sum of £——, during his life. AND I DIRECT that each of the said several annuities hereinbefore bequeathed, shall be paid, clear of legacy duty and all other incidental expenses and deductions, by equal quarterly payments, with a proportional part thereof so as to complete the period between the day of my decease and the day of the decease of the said annuitant; and that the first payment of each of the said annuities shall be made within three calendar months from my decease, and shall be proportional to the time which shall have elapsed from the day of my decease to the day of such payment.

Direction to trustees to set apart a fund for annuities.

AND I DIRECT AND REQUEST my said trustees or trustee for the time being, to provide for the several annuities hereinbefore bequeathed, [(except the said annuities and rentcharges hereinbefore given and bequeathed to the said [*annuitants*]), (*or*, hereinbefore charged on the hereditaments devised to my eldest son)], by setting apart a sufficient portion of the said trust-premises [*or*, of the produce of my residuary [real and] personal estate] for that purpose, or by purchasing an annuity or annuities of the like amount or respective amounts from Government, or from some respectable public life insurance or annuity company.

Proviso in case fund set apart proves insufficient.

AND I DECLARE, that, if any part or parts of the same trust-premises [*or*, of the produce of my said residuary [real and] personal estate] should be so set apart as aforesaid, and the annual produce or income of such part or parts respectively should, at the time or respective times of their being so set apart, be sufficient to produce the annuity or respective annuities for which the same shall be set apart, the setting apart of such part or parts re-

spectively of the said trust-premises [*or*, of the produce of my said residuary [real and] personal estate] shall be deemed and taken to be a complete satisfaction of the trust to provide for the annuity or annuities for which the same shall be so set apart, and shall be a complete exoneration of the other parts of my estate therefrom, although such part or parts respectively shall afterwards prove insufficient to provide for the same annuity or respective annuities; But the capital of such part or parts respectively shall, if necessary, be applicable to the payment of the annuity or respective annuities to provide for which the same shall have been set apart. And I DIRECT, that a proportional part or proportional parts of each of the said annuities hereinbefore bequeathed shall be paid, so as to complete the period between the day of my decease and the day of the decease of the annuitant.

In case of deficiency of funds set apart, annuities to be paid out of capital.

Apportionment.

19 *n*. I BEQUEATH the several annuities following: namely, To [*name, &c.*], an annuity of £——; To [*name*], the wife of [*name*], an annuity of £——, for her sole and separate use, free from marital control, and without power of anticipation; To &c. [*other annuities*]; The said several annuities to be respectively payable during the respective lives of the several annuitants, in equal half-yearly portions; and the first of such portions to be paid at the end of six calendar months from my decease, and a proportionate part of each annuity to be paid to the executors or administrators of the annuitant up to and inclusive of, and within one calendar month after his or her decease; And, as to each of the said annuities, I DIRECT my trustees and executors to appropriate in their names, within twelve calendar months after my decease, a sufficient fund in Three per Cent. Stock to answer, by the dividends thereof at the period of appropriation, the payment of the annuity, and in the meantime to pay the annuity out of the monies to arise from my real and residuary personal estate hereinafter devised and bequeathed; but the annuity shall, after such appropriation as aforesaid, be payable out of the income, or if that be insufficient, out of the capital of the appropriated fund exclusively, in exoneration of my other estate; And such fund shall, subject to the payment of the annuity, form part of my residuary personal estate.

Life annuities; *(Short form)*.

—time of payment;

—appropriation of funds.

19 *o*. UPON TRUST to appropriate and set apart so much of the said stocks, funds, and securities, as shall at the time of such appropriation yield and produce the annual sum of £——, clear of all incidental expenses and deductions, and to pay unto

(Trusts of residue)—to appropriate fund for payment of annuity.

or otherwise authorise and empower my said wife, or her assigns, to receive and take the annual produce and income of such appropriated fund(*a*) for and during such time as she shall

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Remarks upon the appropriation of fund for annuity.

(*a*) Where a testator directs a fund to be appropriated to the payment of an annuity, it should be made distinctly apparent whether the legatee is to be entitled to his annuity out of the capital, if the income of the fund should become insufficient to answer it, or his claim is to be restricted to such income. Many questions of this nature arose on the successive reductions of the Navy Five per Cents. and the Four and Three-and-a-Half per Cents. to annuities of a lower denomination. The more convenient course certainly is, to give the annuitant the entire income of the fund, which, at the time of the appropriation, produced the annuity (as in the text), regardless of subsequent fluctuations, as it would be troublesome to pay over to the residuary legatees, or accumulate for them, any trifling excess, and still more so, from time to time to sell small portions of the capital to make up any deficiency in the income to answer the annuity. Perhaps, indeed, it may be thought that this plan places too much discretionary power in the hands of the trustees, who might select a security (for instance a mortgage) yielding a rate of interest higher than could ordinarily be obtained, and thereby expose the annuitant to a probable diminution of income when the security is changed [but this may be guarded against by authorising the payment of the annuity out of the capital, if the income is deficient, as in the forms (19 *m*) and (19 *n*).] The Three per Cents. are in little danger of being in this predicament, and therefore seem to offer the most eligible species of investment for an annuitant whom a testator is anxious to guard against the possibility of loss. The trust in the text should then be varied as follows, omitting the words within crotchets:—

Clause authorising trustees to appropriate 3 per Cent. Consols or 3 per Cent. Reduced to answer annuities.

"Upon trust to appropriate and set apart, or purchase, in the names or name of my said trustees or trustee, such a sum or share, or such sums or shares of Three Pounds per Centum Annuities, [or, with the consent, in writing, of the said [*annuitant*], appropriate or invest such a sum of money in any other of the public stocks or funds of Great Britain, or on any real security in England or Wales], as shall be sufficient, at the time of such appropriation, to answer and pay the annual sum of £——, and to pay unto &c."

Where it is desired not to circumscribe the power of investment within such narrow limits, and yet to secure the annuitant against being compelled to accept of a security not approved by herself, and at the same time to prevent the trustees from being embarrassed by her refusal to signify her consent, if made absolutely requisite—a case which sometimes occurs—these several objects may be attained by providing alternatively that the appropriated fund shall consist either of Three per Cent. stock, *or, in the discretion of the trustees, of such other securities as the annuitant shall consent to accept.*

remain my widow. And I direct, that, until such appropriation as aforesaid shall be made, the said annual sum of £—— shall be paid out of my general residuary estate in equal half-yearly portions, the first half-yearly payment thereof to be made at or before the expiration of six calendar months next after my decease, and to be proportional to the time which on the day of such payment shall have elapsed from my decease. [And I declare, that the provision hereby made for my said wife shall be in lieu and full satisfaction of all dower, thirds, and freebench, which, at common law, or by any custom, she can, shall, or may, or otherwise might claim or be entitled to have in, of, or out of any of my lands, tenements, or hereditaments, of what tenure or nature soever; And that she, my said wife, shall, if requested, at the costs of the person requiring the same, release the same lands, tenements, and hereditaments, and my trustees in respect thereof, from all right and title to such dower, thirds, or freebench.] And I direct, that, subject to the payment of the said annual produce and income thereof to my said wife, the funds to be appropriated as aforesaid shall fall into and become part of my residuary trust-monies, funds, and securities hereinafter disposed of. And I declare, that my said wife shall be entitled to a proportional part of the same annual sum, or of the annual produce and income of the said appropriated fund, (as the case may be), up to and including the day of her second marriage or death, whichever shall first happen.

Provision to be in lieu of dower.

Wife to release dower.

Subject to annuities, the appropriated funds to fall into the residue.

Apportionment of annuity.

19 *p.* And I authorise my said trustees or trustee to appropriate or purchase, in their or his names or name, such a sum or share, or such sums or shares of Three Pounds per Centum Annuities, [or, with the consent in writing of the said [*annuitant*], invest such a sum of money in any other of the public stocks or funds of Great Britain, or on any mortgage of real or personal property, as shall be sufficient, at the time of such appropriation, purchase, or investment,] to answer and pay the said annuity, which shall thenceforth be exclusively charged on such appropriated funds or securities, and the annual produce and income, or, if necessary, the capital thereof.

Authority to set apart 3 per Cents., (or, with consent of annuitant, other securities), for annuity.

20 *a.* And I hereby direct, that my said trustees or trustee for the time being shall appropriate and set apart so much of the said trust-funds and premises as will, at the time of such appropriation, yield or produce, by the annual produce and income thereof, the clear yearly sum of £——; and shall, with or out of the annual produce and income of such appro-

(*Trusts of residue*)—to appropriate a sum sufficient to produce an annuity of £——, and to pay such annuity to testator's wife

during her widowhood;

priated fund, or failing the same, then with or out of the principal fund, pay unto my said wife or her assigns during her life, if she should so long continue my widow, an annuity of £——. But if my said wife should marry again, then my said trustees or trustee shall, with or out of the annual produce and income of such fund, or failing the same, then with or out of the principal fund, pay unto my said wife during her life, for her sole and separate use, free from the control, debts, or engagements of her husband, and without power of alienation or anticipation, an annuity of [*reduced annuity*], in lieu of the said annuity of [*original annuity*]; The said annuity of [*original annuity*] or [*reduced annuity*], as the case may be, to be paid clear of all deductions and incidental expenses (*a*), in equal half-yearly portions, on the —— day of ——, and the —— day of ——, in every year; the first payment of the said annuity of [*original annuity*] to be made in full on such of the said half-yearly days of payment as shall next happen after my death, from the half-yearly day preceding which event the said annuity is to commence; and the first payment of the said annuity of [*reduced annuity*] to be made on such of the said half-yearly days of payment as shall next happen after the marriage of my said wife; And, until such appropriation as aforesaid, the said annuities respectively to be paid out of my general personal estate; And in case of the death of my said wife on any day not being one of the said half-yearly days, a proportional part of such annuity as shall then be current, in respect of the fraction of a half-year from the last preceding half-yearly day of payment, or if no such day shall have arrived the day of my decease, up to the day of her decease, to be paid to her executors or administrators. PROVIDED ALWAYS, AND I HEREBY DIRECT, that, in case the said annuity of [*reduced annuity*] should become payable by means of the second marriage of my said wife, then my trustees or trustee for the time being shall continue and keep appropriated so much and such part only of the stocks, funds, or securities which they or he shall have originally appropriated to answer the said annuity of [*original annuity*], as shall be sufficient, with or out of the annual produce and income thereof at the time of such appropriation, to discharge the said annuity of [*reduced annuity*]; and the residue of the stocks, funds, or securities so appropriated shall fall into and form part of my residuary estate and funds hereinafter disposed of. AND, as to the residue of the monies to arise from my real estate, and

but if she should marry again, then a less annuity.

Either annuity to be paid half-yearly;

and, until such appropriation, to be paid out of general personal estate.

If reduced annuity become payable, trustees to reduce the fund.

(*a*) [These words would exempt the annuitant from legacy duty if she were only the reputed wife of the testator.]

also as to my personal estate and the monies to arise therefrom, and the stocks, funds, or securities in or upon which all such monies shall be laid out and invested after the appropriation by me before directed of funds to answer the said annuity of [*original annuity*] or [*reduced annuity*], as the case may be, to my said wife as aforesaid, and also as to the whole of such appropriated funds after the decease of my said wife, and as to a proportional part thereof as aforesaid after her second marriage, if that event should happen, I HEREBY DIRECT, that my said trustees or trustee for the time being shall stand and be possessed of and interested in all and singular the said residuary monies, stocks, funds, securities, and premises (*upon ulterior trusts*).

Trusts of appropriated funds subject to annuities.

20 *b.* I DIRECT my said trustees or trustee for the time being, out of the annual produce and income of and from my residuary estate, to pay to my mother [*name*] an annuity of £——, during her life, clear of legacy duty and all other incidental expenses and deductions, by equal quarterly payments, on every —— day of ——, —— day of ——, —— day of ——, and —— day of ——, the first payment to be made in full on the first of such days which shall happen after my decease (from the quarter day preceding which event the said annuity is to be computed) (*a*), and a proportional part of the said £—— for and in respect of any fractional part of a quarter immediately preceding her decease to be paid to her executors or administrators. AND in case at any time or times, by reason of the decease of my brother [*name*] without making a sufficient provision by his will, or otherwise, the allowance which he is in the habit of making to my said

Annuity to testator's mother to be paid out of income of residue;

—to be increased if testator's brother discontinue the allowance made by him.

(*a*) [This annuity is supposed to be a continuation of an allowance made by the testator during his life, and is directed to be made on the days on which that allowance is usually paid. Another form of the provision would be :—

Annuity intended as a continuation of an allowance paid by testator.

"By equal quarterly payments on such quarter days as shall be most convenient with reference to the state or investments of the fund or funds to be appropriated for payment of the said annuity; the first payment to be made on the first of such days which shall occur after my decease, and to be proportional to the period which shall have elapsed up to the day of such first payment from such of the four quarterly days with reference to which I usually pay an annuity of the same amount to my said mother, (namely, the —— day of ——, and the other corresponding quarter days), as shall last occur before my decease."]

mother should be discontinued, or interrupted, or reduced below the annual sum of £——, then I DIRECT my said trustees or trustee for the time being, out of the annual produce and income of my said residuary estate, from time to time to pay to my said mother, such further sum or sums of money in addition to, and to be paid at the same time or times with, any quarterly or other payment or payments of the said annuity of £——, hereinbefore given to her, as shall from time to time be sufficient, together with the said annuity of £——, and the sum or sums (if any) to be from time to time received by my mother from my said brother or his estate, to make up to my said mother the full annual sum or yearly income of £——, from such quarter day as aforesaid next preceding my decease, during the remainder of her life, with a proportional part of such yearly income of £——, for and in respect of any fractional part of a quarter immediately preceding her decease, to be paid to her executors or administrators. AND I DIRECT that such payments, in addition to the said annuity of £——, shall be made clear of legacy duty and all other incidental expenses and deductions; And that my said trustees or trustee for the time being shall not be bound to make any further or other inquiry, or seek for any further or other evidence, as to the fact of the discontinuance or diminution of the said allowance from my said brother, than they or he shall think proper, or be answerable for any payment made under mistake or misinformation in respect thereof. [*Add authority to set apart a fund, as in* (19 *i*[2]), (19 *p*), *or* (24 *d*[2])].

Trustees not to be answerable for payments in ignorance of allowance by brother.

(*Trusts of a specific fund or of residue*)—to pay life annuities to testator's mother and sister,

21 *a*[1]. UPON TRUST, from time to time, during the life of my mother, [*name*], by, with, and out of the interest, dividends, annual produce, and income of the said trust-funds and premises, to pay to her an annuity of £——; And during the life of my sister, [*name*], to pay to her an annuity of £——; such annuities to be paid to the said annuitants respectively clear of legacy duty and all other incidental expenses and deductions whatsoever, in equal portions half-yearly, on the 5th day of January, and the 5th day of July, in each year, the first of such payments to be made in full on such of the said days as shall happen next after my decease; And on the decease of each of the said annuitants respectively, a proportional part of her annuity to be paid to her executors or administrators, for and in respect of the fractional part of a half-year (if any) up to the time of her decease. AND, sub-

and to pay the

ject to the payment of the several annuities, UPON TRUST to permit and suffer my said wife, [*name*], to receive and take the interest, dividends, and annual produce of the said trust-monies, stocks, funds, and securities during the term of her natural life, or until she shall marry again. AND, from and after the decease or marriage of my said wife, which shall first happen, UPON TRUST that my said trustees or trustee for the time being will and shall, by, with, and out of the said trust-funds and premises, or by sale, transfer, or other disposition thereof, or of an adequate part or parts thereof (but without prejudice to the aforesaid annuities of £—— and £——), levy and raise so much money as will be sufficient to pay and satisfy the said several legacies hereinbefore by me bequeathed and made payable on the deccase or marriage of my said wife as aforesaid, at the respective times and in manner hereinbefore appointed for payment thereof; And also will and shall, by, with, and out of the said trust-funds and premises, or by sale, transfer, or other disposition thereof, or of an adequate part or parts thereof, raise the sum of £—— sterling, and will and shall lay out and invest the same in their or his names or name in some or one of the public stocks or funds of Great Britain, or upon real securities in England or Wales, and not in Ireland, UPON TRUST, nevertheless, from time to time to pay the interest, dividends, and annual produce thereof to my daughter, [*name*], the wife of ——, during her life, for her own sole and separate use, independently of the control, interference, debts, and engagements of her present or any future husband, and so that she shall have no power to alien or anticipate the same or any part thereof; And, after her decease, then as to the last-mentioned stocks, funds, and securities,

residue of income to wife for life or widowhood.

After her death or marriage, to raise the other legacies, and also a legacy for married daughter for her separate use during her life; and, after her death,

21 *a*[2]. IN TRUST for such child or children of my said daughter, [*married daughter*], as shall, [being a son or sons], attain the age of twenty-one years, [or, being a daughter or daughters, attain that age] or marry, and if more than one, to be equally divided between or among such children; The annual income arising from the expectant or presumptive share of any and every child, who, at the decease of my said daughter, [*name*], shall not have acquired a vested interest therein, to be applied in such manner as my said trustees or trustee shall think proper for the maintenance of such child, notwithstanding that his or her father may be living and of ability to provide such maintenance; And if there should be no child of my said daughter who shall live to acquire a

In trust for daughter's children.

Maintenance of infants.

Also to raise £——; and, subject thereto,

vested interest in the said legacy, then I direct that the said sum of £——, and the stocks, funds, and securities whereon the same shall be invested as aforesaid, shall sink into and be considered as part of the residue of the said trust-funds and premises whence the same shall have arisen or been raised.

21 *a* [3]. And, subject to the raising and paying of the said several annuities and legacies hereinbefore mentioned and directed to be raised and paid, Upon trust, that my said trustees or trustee for the time being will and shall, from and after the decease or marriage of my said wife, which shall first happen, by, with, and out of the said trust-funds and premises, or by transfer, sale, or other disposition of an adequate part or parts thereof, levy and raise the sum of £—— sterling, or so much thereof as the said trust-monies, stocks, funds, and securities will be sufficient to raise, and will and shall pay the same sum of £——, or so much thereof as shall be produced by the said trust-funds and premises as aforesaid, unto and amongst all and every, or such one or more of my children, or the issue of any of such children, born or to be born before the decease of my said wife, or within twenty-one years afterwards, (whether the parents or ancestors of such issue shall be living or dead), at such times and in such shares and proportions, and with such restrictions and such limitations over to and in favour of some or one or more of the said child or children or issue, as my said wife, at any time during her widowhood, by any deed or instrument in writing, under her hand and seal, and with or without power of revocation and new appointment, or by her last will and testament, or any codicil or codicils thereto, shall direct or appoint (*a*). And as to, for, and concerning, as well the said sum of £—— lastly mentioned, in case no such direction or appointment shall be made thereof as aforesaid, or so much thereof of which no such

In trust for testator's children and their issue, as wife during her widowhood shall by deed or will appoint.

And as to the residue, and in default of appointment also as to the £——,

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As to giving to parents a power of selection.

(*a*) Where children take vested interests in a reversionary fund, of which the income is given to their parent for life, it is often expedient to reserve to the latter a power of varying the shares, as well for the purpose of securing to the donee a wholesome degree of parental influence as of enabling him to adjust the disposition to the exigencies of the respective objects, and introducing such modifications as circumstances may require; and it has another advantage, not often considered, *that it checks the children in the disposal of their reversionary interests;* for a vested share which is liable to be cut down or wholly defeated by an appointment, of course is not a marketable commodity. Who, that knows anything of the nature of reversionary bargains, will deem this to be a trivial advantage?

direction or appointment shall be made, as also the surplus, if any such shall remain, of the said trust-monies, stocks, funds, and securities, after the purposes aforesaid shall be fully answered and satisfied, IN TRUST for all and every the child and children of me the said [*testator*], who shall be living at the time of my decease, in equal shares, to be an interest vested in each such child immediately on my decease.

In trust for testator's children equally.

21 *a*[4]. PROVIDED ALWAYS, AND I HEREBY DIRECT AND DECLARE, that, in case the monies to arise by the sale of the real estate hereinbefore by me made saleable, and the public stocks, funds, Government and real securities, of or to which I shall die possessed or entitled as aforesaid, should not, after payment thereout of my debts and funeral and testamentary expenses, be sufficient to pay and satisfy the whole of the several legacies and annuities hereinbefore by me directed to be paid thereout (*a*) as aforesaid, then the deficiency shall wholly fall upon and be satisfied out of the legacy of £—— hereinbefore bequeathed to my said children (subject to the power of appointment of my said wife); and in case such deficiency should exceed the amount of the last-mentioned legacy, then I declare that one moiety or half part (being the moiety over which the power of settlement hereinbefore contained does not extend,) of the several legacies of £—— a piece hereinbefore bequeathed to my said unmarried daughters, and the said legacy of £—— bequeathed to or in trust for my said daughter, [*married daughter*], and her children, shall respectively abate in proportion to the respective quantums or amounts thereof, but the other legacies hereby bequeathed shall be paid in full.

In case of insufficiency of funds for legacies, one to bear deficiency, and if insufficient, others to abate proportionably.

(*a*) Where a testator has bequeathed legacies, payable at different periods out of a fund of indefinite amount, some of which will become payable before it can be known whether the produce of the fund will be sufficient to pay all the legacies in full, it is convenient to give to the legatees priority according to the prescribed order of payment; otherwise the executors are compelled either to suspend the payment of all the legacies until the net produce of the fund has been ascertained (which seems contrary to the intention), or else to take security from the legatees to refund, which is generally attended with inconvenience and expense.

As to the priority and order of payment of legacies.

The ordinary expressions in a will descriptive of the order of paying pecuniary legacies, are not considered to denote an intention to vary or disturb the equality which, by the general rule of equity, obtains among legatees of any given class. Vide ante, p. 405.

Annuities to have priority over legacies.

21 a^5. And I further direct and declare, that none of the legacies to my children (included in the last-mentioned class) shall be paid until full and adequate provision shall have been made for the payment of the annuities of £—— and £—— hereinbefore bequeathed.

Clause authorising trustees in a certain event to purchase annuities.

21 a^6. Provided always, and I hereby declare, that if my said mother and sister, or either of them, should be living at the decease or marriage again of my said wife, so that the continuance of the annuities or annuity hereinbefore given to them or her shall become an obstruction or impediment to the complete and final distribution of the trust-funds and premises, the income whereof is charged with the payment of the said annuities or annuity respectively, then and in such case it shall be lawful for my said trustees or trustee, if they or he should deem it expedient so to do, to apply an adequate portion of such trust-funds and premises in the purchase, for my mother and sister respectively, or such of them as shall be then living, of one or more life annuity or annuities (as the case may be), equal in amount to the annual sum or sums hereby directed to be paid to her or them respectively; such purchase to be made from the British Government or some corporate body or bodies, or from some individual or individuals, who shall secure the same by powers of distress and entry upon lands or other hereditaments; And when and immediately after the annuity or respective annuities so purchased shall commence, the annual sum or sums hereby bequeathed to my said mother and sister respectively, or such of them as shall be living as aforesaid, shall absolutely cease, any thing hereinbefore contained to the contrary notwithstanding(*a*). And I declare, that the said annuitants

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Convenience of enabling trustees to purchase annuities in certain cases.

(*a*) It often happens, that the distribution of a residue is protracted by the continuance of small annuities payable out of the income; such would be the case in the present instance, if the testator's mother and sister, or either of them, should be living at the death or marriage of his wife, when the distribution of the residue would, but for the annuities, take place. The best mode of guarding against this inconvenience seems to be, as in the text, to authorise the trustees under such circumstances to purchase a Government or other life annuity for the legatee in lieu of the one given by the will. The difference between the clause in the text and that which occurs in the forms (19 *b*), (19 *n*), &c., is, that *there* the purchase is to be made absolutely, and in the first instance, (the general residue out of which the annuity is payable being distributable in regard to some of the legatees instanter); while *here* the annuities are only to be purchased in certain events.

shall not nor shall either of them, or their or her personal representatives, be at liberty to elect to take and receive in lieu of the annuities or annuity so as aforesaid directed to be purchased, the price or value thereof, any rule of equity to the contrary notwithstanding.

21 *a*[7]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that the yearly income or provision hereinbefore by me given to or made for my said wife during her widowhood as aforesaid, was and is so given and made for the maintenance, support, and mutual benefit of herself and my daughters, or such of them as shall for the time being be living and unmarried, and until their respective marriages in the lifetime of my said wife; But so nevertheless that no such last-mentioned daughter shall, previously to her attaining the age of twenty-one years, be entitled at law or in equity to have or claim the payment or expenditure, by and out of the said annual income or provision of my said wife, of more than the annual sum of £—— for her maintenance, support, and benefit; And that no such daughter, having attained the age of twenty-one years, shall be entitled at law or in equity to have or claim by and out of the said annual income or provision more than the annual sum of £—— for her maintenance, support, and benefit. AND I DECLARE, that it shall not be incumbent on my said trustees or trustee for the time being to see to the due application of the sum or sums of money which ought to be applied by my said wife to the purposes and in manner aforesaid.

Provision for wife to be for maintenance of herself and daughters until marriage:—direction as to what each daughter may claim for maintenance.

22 *a*. UPON TRUST, during the life of my son, [*name*], out of the income therefrom, to set apart the weekly sum of £——, and be possessed thereof upon trust, from time to time, to pay the whole, or so much (if any) of the said weekly sum of £——, as my said trustees or trustee shall think fit, to my said son, [*name*], or apply the same for his benefit in any way my said trustees or trustee shall think fit; And as to any residue of the said weekly sum, or the whole thereof, if no part thereof be so paid or applied, either, at the discretion of my said trustees or trustee, to pay the same to or for the benefit of any wife of my said son for her separate use, or to invest and accumulate the same, with power from time to time to apply such accumulations in any manner in which my said trustees or trustee are hereby authorised to apply the said weekly sum; And as to such accumulations as shall remain un-

(*Trusts of residue*)—to set apart a weekly sum, and, at the discretion of the trustees, to apply all or any part for the benefit of an improvident son or of his wife, and to accumulate any surplus.

Accumulations,

at death of son, for his widow and children, as trustees shall appoint.

applied at my said son's decease, to pay or divide the same to or among, or apply the same for the benefit of, his surviving wife and child or children (if any), or any one or more of them, in such shares and manner as my said trustees or trustee shall think fit; and if there be no such wife or child, then to add such accumulations to my residuary personal estate (*a*). AND, subject to the dispositions hereinbefore contained, I DIRECT my said trustees or trustee for the time being to be seised and possessed of my said residuary real and personal estate. (*Ulterior trusts*).

(*Trusts of residue*)—Annuity to be applied, in the discretion of trustees, for the benefit of improvident brother.

22 *b*[1]. I DIRECT my said trustees or trustee for the time being to set apart out of the annual produce and income of and from my residuary estate an annuity of £——, during the life of my brother, [*name*], such annuity to commence and be computed from the day (*b*) of my decease, and to be made up by apportionment, if necessary, to the day of the decease of my said brother, and to be applied by my said trustees or trustee for the time being, in manner following, (that is to say): I AUTHORISE my said trustees or trustee, in their or his absolute discretion, and if they or he shall think fit but not otherwise, from time to time, and at such time or times as they or he shall think proper, to pay and apply all or any part or parts of the said annuity to or for the benefit of my said brother, [*name*], in such manner in all respects as my trustees or trustee shall think fit; And, as to such part or parts of the said annuity (if any) as my said trustees or trustee shall not so pay or apply, to pay or apply the same or any part or parts thereof (if, and as, and at such time or times as, they or he shall think fit), to or for the sole and separate use and benefit of any wife or child or children of my said brother; And, as to any part or parts of the said annuity which may not be applied

Power to apply any part of annuity for benefit of any wife or child of brother;

As to provisions against alienation.

(*a*) [The only way in which a strictly inalienable provision can be made for the benefit of a person not under coverture, is either by means of a proviso for cesser on alienation (which deprives the object of any possibility of future benefit from the provision), or by giving to trustees a discretion to choose between the object in question and some other person or persons; and even here, if insolvency or bankruptcy intervenes, the trustees would not be justified in afterwards making any payment to the insolvent or bankrupt, though the interest of his assignees in the benefit of an appointment might probably be purchased at almost a nominal price; and in such event, unless the discretionary power of the trustees are very large, the object or objects in whose favour the alternative trust is declared, might perhaps be entitled to call upon the trustees for an immediate transfer of the fund].

(*b*) [Or from a day before the testator's death. See (20 *b*)].

to either of the purposes aforesaid, to invest in the public funds or on real security and accumulate the same, and such income therefrom as shall not be otherwise applied in exercise of any power herein contained, and to be possessed of such investments and accumulations and the income therefrom, UPON TRUST, if my said trustees or trustee for the time being shall think fit, but not otherwise, at any time or times to apply all or any part or parts of such accumulations and income, to or for the benefit of my said brother, or of all or any one or more of the wife and children for the time being of my said brother (if any), in the same manner, and with the same absolute discretionary powers as are hereinbefore mentioned with respect to the said annuity; And as to any wife for her separate use; And, after the decease of my said brother to pay and transfer such accumulations (if any) of the said annuity, as shall have been made and shall remain unapplied, unto or equally among such child or children of my said brother as shall be living at his decease; With power for my said trustees or trustee to apply the income or principal of any minor's share in or towards his or her maintenance or education; And if there be no such child, to pay and transfer the same accumulations to the widow of my said brother; And, if he leave neither child nor widow, to add the same accumulations to my general residuary estate.

—to accumulate unapplied parts.

After death of brother, any accumulations to go to his children, if any; if no child, for widow.

22 *b*[2]. AND, for the purpose of facilitating the execution of the trusts of the said annuity, I AUTHORISE my said trustees or trustee, while my said brother, or any wife or child of my said brother, shall be in Australia or elsewhere abroad, to employ any agent or agents in Australia or elsewhere abroad, and to delegate to such agent or agents all and every or any of the discretionary or other powers or authorities which my said trustees or trustee would have, or might personally exercise, in relation to the said annuity, without being answerable for the acts or defaults of any such agent or agents.

Power to appoint agents in Australia, and to delegate powers.

22 *c*. I DIRECT my trustees or trustee to set apart or purchase, in their or his names or name, the sum of £—— Three per Centum Annuities, in trust, from time to time, and at such time or times and in such manner as my trustees or trustee shall in their or his absolute discretion think fit, to apply all or any part or parts of the income from such trust-fund for the personal benefit of my son, [*name*], or of his wife for the time being, or both of them; And as to his wife for her sole and separate use; And to invest and

Annuity to be applied as trustees shall think fit, for the benefit of A. B.

Accumulation.

accumulate the unapplied income (if any), and add the same to the capital of such fund; With power at any time or times to apply such accumulations as if the same were income. And, after the expiration of twenty-one years (*a*) from my decease, if my said son should be living, I direct that so much of the income from such trust-fund and accumulations as shall not be applied for the benefit of my said son shall sink into the residue of my personal estate; And, after the decease of my said son, I direct that the said trust-fund and accumulations shall sink into my personal estate. (*See a form of an independent provision for the issue of the son*, (38 *l*) *or* (39*d*.))

Unapplied portion of annuity to sink into residue.

22 *d*. And, if the said [*annuitant*] should assign the said annuity, or commit or suffer any act, process, or default (*b*), by means whereof, but for this provision, the said annuity would become wholly or partially vested in, or charged for the benefit of, any other person or persons, then and thenceforth the said annuity shall, from the day of quarterly payment which shall have next preceded such act or cause of forfeiture (*c*), cease [*or*, be paid to the wife of the said [*annuitant*] (if any) during their joint lives for her separate and inalienable use] [*or*, be paid to A. B. during his own life, and on the decease of the said A. B., shall determine] (*c*).

Annuity to cease on alienation (or to go over to the annuitant's wife or to A. B.)

23 *a*. Upon trust, out of the income therefrom, to pay to my wife during her life, the annual sum of £——; And to pay to each of my sisters, [*names*], during her life, the annual sum of £——; And to pay to each of my sons the annual sum of £——, during his life, or until he shall commit or suffer any act, process, or default, which, but for this condition, would have the effect of giving the benefit of the same annuity, either wholly or partially, to any other person; And to pay to each of my daughters, during her life, the annual sum of £——, for her separate and inalienable use during any coverture. And I direct, that all the said annuities shall

Annuities to various persons.

Annuities to sons, to cease on alienation, bankruptcy, &c.

Annuities to daughters, for their separate and inalienable use;

Limit of accumulation.

(*a*) [The accumulation of income beyond twenty-one years being prohibited by the Thellusson Act, it is proper to exclude any doubt as to the application of the future income by an express declaration. In the preceding form such a declaration is rendered unnecessary by the discretionary powers vested in the trustees.]

(*b*) [These words include alienation by bankruptcy or insolvency.]

(*c*) [Vide ante, p. 486, n. Under the proviso for cesser it is conceived that the annuity would not be apportionable; but if it were given over, it clearly would be apportionable for the benefit of the annuitant's assignee. See *Shipperdson* v. *Tower*, 8 Jur. 485.]

be paid, clear of legacy duty, by equal quarterly payments, on the 5th day of January, the 5th day of April, the 5th day of July, and the 10th day of October, with proportional parts for the respective periods intervening between the day of my decease and the first of such days which shall next occur, and between the last of such days in respect of each annuity and the day of the decease of the annuitant. AND I DIRECT, that, during the minority of each of my children, my trustees or trustee shall apply a competent portion of the annuity hereby provided for such child towards his or her maintenance and education, and shall accumulate the surplus for the absolute use and benefit of such child, when he or she shall attain the age of twenty-one years, or shall marry; PROVIDED, that if such child should die under the age of twenty-one years, and unmarried, then such accumulation shall sink into the residue of my personal estate.

—apportionment;

—maintenance and accumulation during minorities.

24 *a*[1]. I GIVE AND DEVISE unto my said wife and her assigns, during so long as she shall continue my widow, an annuity or yearly rent-charge of £—— sterling, to be yearly issuing and payable out of and charged and chargeable upon all and singular my lands and hereditaments, situate at —— aforesaid (*a*), the said annuity or yearly rent-charge to be payable and paid to her my said wife, or her assigns, in equal quarterly portions in every year, clear of all incidental expenses and deductions, with a proportional sum for any fractional portion of a quarter of a year which may happen immediately to precede the determination thereof, the first quarterly payment of the said annuity or yearly rent-charge to be made at the expiration of three calendar months next after my decease, [*or*, the determination of the trusts hereinafter contained for the management and carrying on the business of my said farm,] and the said proportional sum to be payable immediately after the decease or marriage of my said wife.

Rent-charge to wife during widowhood;

—[to commence when farming business is given up.]

24 *a*[2]. AND I HEREBY DECLARE, that, in case the said annuity or yearly rent-charge of £——, or the aforesaid proportional part thereof, should at any time or times be in arrear and unpaid in the whole or in part for the space of fourteen days next after any of the said days or times herein-

Power of distress.

(*a*) A rent-charge being an inconvenient incumbrance upon an estate, it is generally desirable not to charge it upon all the testator's real estates, if a specific estate can be found of sufficient value to afford an ample security.

before appointed for the payment thereof, then, and so often as the same shall happen, it shall be lawful for my said wife, her executors, administrators, or assigns, to enter and distrain for the same, and for the costs and expenses occasioned by the nonpayment thereof, upon all or any part of the said hereditaments hereby charged with the payment of the said annuity or yearly rent-charge, in the same manner in all respects, and with the like consequential rights, as landlords are authorised by law to do for rents reserved on common leases for years; And also, that in case the said annuity or yearly rent-charge, or such proportional part thereof as aforesaid, should at any time or times be unpaid either in the whole or in part for the space of twenty-eight days next after any of the days or times hereinbefore appointed for the payment thereof, then and so often as the same shall happen, (although there may not have been any legal demand of the same), it shall be lawful for my said wife, her executors, administrators, or assigns, to enter into and upon, and to hold, without impeachment of waste, all or any part of the said hereditaments hereby charged as aforesaid, and to retain such possession, and to receive the rents and profits thereof for her or their own use, until she or they shall thereby or otherwise be fully paid and satisfied the arrears of the said annuity or yearly rent-charge which shall be due at the time of such entry, and the arrears of the same which may afterwards become due during the time of her or their being in possession of the said hereditaments, and all costs and expenses occasioned by the nonpayment thereof at the days or times aforesaid (*a*).

Power of entry.

As to limiting a term of years to trustees to secure a rent-charge.

(*a*) It will be observed, that the rent-charge to the testator's wife is not secured by a term of years. It does not appear to be quite so usual in wills as in settlements to limit terms for securing rent-charges, though there seems to be no material ground for any distinction between them. Where the annual value of the lands charged greatly exceeds the burthen, it is of course less important that the rent should be accompanied by the limitation of an estate than where the surplus is inconsiderable. The principal advantage is, that the trustees having the immediate reversion are enabled to receive the rent accruing under any subsisting demises, for it is to be remembered, that powers of distress and entry conferred by will are inoperative against tenants holding under any demises subsisting at the time of the testator's decease. The situation of the property, therefore, in respect to tenants' holdings, &c., is often proper to be taken into consideration in determining the propriety of vesting in trustees a term of years to secure a rent-charge. But even supposing the exercise of the powers of distress and entry not to be impeded by any existing tenancy, trustees entering by virtue of an es-

24 a^3. And I also give and bequeath unto [*trustee*], (*a*) of &c., his executors, administrators, and assigns (*b*), for and during the life of my sister, [*name*], an annuity or yearly rent-charge of £—— sterling, to be yearly issuing and payable out of and charged and chargeable upon all and singular the hereditaments hereinbefore mentioned, the said annuity to be payable and paid in equal portions quarterly in every year, clear of legacy duty and all other incidental expenses and deductions, with a proportional sum for any fractional portion of a quarter of a year which may happen immediately to precede the decease of the said [*sister*], the first quarterly payment thereof to be made at the expiration of three calendar months next after my death, and the said proportional sum immediately on the decease of the said [*sister*]. And I declare, that the legacy duty payable in respect of the said annuity or yearly rent-charge [and all incidental expenses (*c*)], shall be discharged out of my residuary personal estate (*d*), but that the said annuity or yearly rent-

Rent-charge to a trustee for life of testator's sister.

Personalty to be charged with legacy duty, but not with rent-charge.

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tate might more conveniently deal with the lands in regard to letting, &c., than the owner of a rent-charge taking possession under a power of entry.

(*a*) As the general trustees are devisees of the real estates, subject to the rent-charges, of course it is necessary to vest the present rent-charge in a different trustee.

Trustee of rent-charge.

(*b*) [See a special power to appoint a new trustee of this rent-charge, among the forms of powers to appoint new trustees.]

(*c*) [The words "all incidental expenses" seem to be out of place, the annuity being primarily charged on the land; the only other incidental expenses beyond the legacy duty must be occasioned by the default of the landowner, who ought, therefore, to bear them. The personal estate would otherwise be liable for an indefinite amount of costs during the continuance of the annuity].

(*d*) An annuity payable out of lands, and secured by powers of distress and entry, is liable to legacy duty: *Attorney-General* v. *Jackson*, 2 Cr. & J. 101. [In *Shirley* v. *Ferrers*, 1 Phill. 167, where it was decided that an annual sum, directed to be raised for the maintenance of an infant out of real estates, vested in the infant for life, was not liable to the duty, Lord Cottenham said, "that nothing but what was in charge on the estate of another person would come within the statute." The duty, but for the declaration in the text, would be payable out of the real estate charged with the annuity, that being given clear of legacy duty.] This impost should always be kept in view in framing gifts by will of annual sums, since the claim of annuitants to be exempt from it has been more frequently the subject of dispute than that of any other class of legatees, chiefly because annuities are usually directed to be paid "free from deduction," words which raise the question of exemption. (Vide ante, Vol. 9, p. 761.) This suggestion, however, does

As to legacy duty payable on annuities.

charge itself shall not be chargeable on or payable out of my personal estate, but only out of the said hereditaments hereinbefore expressly charged therewith. AND I GIVE to the said [*trustee*], his heirs and assigns, in respect of the said annuity of £——, the same or the like powers of distress and entry upon, and perception of the rents and profits of the hereditaments aforesaid, for recovering and enforcing the payment thereof, as I have hereinbefore given to my said wife and her assigns, in respect of the said annuity of £——.

Powers of distress and entry by reference.

Rent-charge to be held in trust for separate and inalienable use of testator's sister.

Cesser on alienation.

24 a^4. AND I DECLARE that the said annuity of £—— shall be held UPON TRUST for and for the sole and separate use and benefit of the said [*sister*], free from the control, debts, and engagements of any husband, and without power of alienation or anticipation. AND I DECLARE, that, in case the said [*sister*] should commit or suffer any act, default, or process, which but for this condition would have the effect of giving her said annuity either wholly or partially to any other person, the same annuity shall immediately thereupon cease (*a*).

Rent-charge to wife, [to commence from the discontinuance of farming business.] (*Concise form.*)

24 b^1. I GIVE to my wife the yearly rent-charge of £——, out of my freehold and copyhold hereditaments at ——, which I purchased of ——, to commence from [the determination of the trusts hereinafter contained for the management of my farming business], and be paid quarterly until her death or marriage, and a proportional part for the time between the last quarter-day and the day of such death or marriage to be paid on such last-mentioned day. I AUTHORISE my wife, her executors, administrators, or assigns, whenever such rent-charge shall be in arrear for fourteen days, to recover the same and all costs by distress upon the said hereditaments; and, whenever such rent-charge shall be in arrear for twenty-eight days, to recover the same and all intermediately accrued arrears, and all costs, by entry upon and perception of the rents and profits of all or any of the said hereditaments, without being impeachable of waste.

Rent-charge to

24 b^2. I GIVE unto and to the use of [*annuity-trustee*],

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not apply to an annuity to the testator's wife, she not being liable to legacy duty, or to a rent-charge in fee, which is also exempt, the duty being charged only on annuities "determinable on any life or lives, or for years, *or other period of time.*" Stat. 36 Geo. 3, c. 52, s. 8, ante, Vol. 9, pp. 740, 742.

(*a*) [See the next form, which is the same in substance but more concise. A provision as to these rent-charges in case of mortgage or sale of the real estate will be found among the clauses for management of real estate, post.]

of &c., his executors, administrators, and assigns, IN TRUST for the separate and inalienable use of my sister, [*name*], a yearly rent-charge of £—— out of my said hereditaments at ——, during the life of my said sister, clear of legacy duty and all other incidental expenses and deductions, to commence from the day of my death, and to be paid quarterly, and a proportional part for the time between the last quarter-day and the day of the death of my said sister, to be paid on such last-mentioned day. I AUTHORISE the said [*trustee*], his executors, administrators, or assigns, whenever such rent-charge shall be in arrear for fourteen days, to recover the same and all costs by distress upon the said hereditaments; and, whenever such rent-charge shall be in arrear for twenty-eight days, to recover the same and all intermediately accrued arrears, and all costs, by entry upon and perception of the rents and profits of all or any of the said hereditaments, without being impeachable of waste. PROVIDED, that, if my said sister, being unmarried, should commit or suffer any act or default by means whereof but for this proviso the said rent-charge would become payable to any other person or persons, the same shall immediately cease.

trustee for sister, for her separate and inalienable use;

—to cease on alienation.

24 *c*. I GIVE to my wife, [*name*], out of my hereditaments at ——, a yearly rent-charge of £——, during her widowhood, clear of all deductions, to commence from my decease, and to be paid quarterly. After her marriage, I GIVE to her the yearly rent of £—— during the remainder of her life for her separate [and inalienable] (*a*) use, to commence from the last day of payment of the first-mentioned annuity, and to be paid quarterly; And a proportional part of such annuity as shall be current at my wife's decease to be paid in respect of the fraction of a quarter immmediately preceding her decease. I EMPOWER my wife, her executors or administrators, to recover the said rent-charges respectively whenever the same shall have been in arrear for twenty-one days, and all intermediately accrued arrears, and all costs, by distress, and also by entry upon and perception of the rents and profits of the hereditaments charged therewith, without being impeachable of waste.

Rent-charge to wife, subject to diminution on marriage;

—proportional part.

Powers of distress and entry.

24 *d*[1]. I GIVE to each of the persons next hereinafter mentioned, during his or her life, the annuity following

Annuities charged on real estate in aid of personalty.

(*a*) [A rent-charge for the inalienable use of a married woman, being an incumbrance that cannot be discharged during the coverture, should not be created if a sufficient provision can be made out of the personal estate.]

his or her name, to be paid quarterly, clear of legacy duty, and all other incidental expenses and deductions, with a proportional part in respect of such annuity for such fractional part of a quarter as shall immediately precede the determination thereof; (Such annuities and proportional parts to be charged on all my freehold, customary or copyhold and leasehold (*a*) estates at ——, in aid of my personal estate, and to be respectively recoverable by the respective annuitants, whenever the same shall be in arrear for twenty-one days, with all intermediately accrued arrears and all costs, by distress or by entry upon and receipt of the rents and profits of all or any of the said real estates at ——; the possession under any such entry to be without impeachment of waste;) Namely, To [*name*], an annuity of £——, for her separate and inalienable use; To &c. (*Other annuities*).

Proportional parts.

Powers of distress and entry.

24 d^2. PROVIDED, that if my trustees or trustee should set apart or purchase, in their or his names or name, a sufficient amount of Three per Centum Annuities, to answer by the dividends thereof all or any of the said annuities, my said real estates, and the residue of my personal estate, shall be exonerated from all future liability in respect of the annuities or annuity which shall be so provided for. PROVIDED ALSO, that no annuitant shall receive the value of his or her annuity in lieu thereof.

If funds are set apart for annuities, residue to be exonerated.

Annuitants not to receive value of annuities.

24 *e*. I GIVE AND DEVISE unto [*annuity trustee*], of &c., his executors, administrators, and assigns (*b*), for and during the life of my sister, [*name*], an annuity or yearly rent-charge of £——, IN TRUST for the sole and separate use of my said sister, free from the debts, control, and engagements of any hus-

Rent-charge to trustee for separate and inalienable use of sister.

As to charging annuities on leaseholds and copyholds.

(*a*) [A rent-charge cannot issue out of leaseholds, but a rent-charge issuing out of freeholds, or a merely personal annuity, may be made recoverable by distress or entry upon leaseholds; ante, Vol. 2, p. 40; *Richardson* v. *Nixon*, 2 Jones & Lat. 250. As to copyholds, it seems that a power of distress is effectual, and also a power of entry, if created by will, or by surrender; ante, Vol. 2, pp. 46, 49; infra, p. 498, n.]

Caution as to limiting rent-charges to trustees.

(*b*) [A single trustee is sufficient where a rent-charge is limited in trust. Care must be taken that the estates charged are not themselves limited to the same trustee for other purposes, in which case the rent-charge would merge, or rather would never arise; and there should be a special provision for the appointment of new trustees, of which a form will be found among the forms relating to trustees.]

[A rent-charge pur autre vie may be limited to the executors or administrators as special occupants, and will devolve upon them if not otherwise limited: *Bearpark* v. *Hutchinson*, 4 Moo. & P. 848; stat. 7 Will. 4 & 1 Vict. c. 26, s. 6, ante, p. 421.]

band, and without power of alienation or anticipation. I ALSO GIVE AND DEVISE unto my sister, [*name*], the wife of [*husband*], of &c., and the said [*husband*], for and during their joint lives, an annuity or yearly rent-charge of £——. I ALSO GIVE AND DEVISE unto the survivor of them my said brother-in-law [*name*] and [*name*] his wife, for and during the life of such survivor, an annuity or yearly rent-charge of £——. I ALSO GIVE AND DEVISE unto my brother, [*name*], for and during his life, an annuity or yearly rent-charge of £——; AND I HEREBY DIRECT that the said several annuities or rent-charges of £——, £——, £——, and £——, shall be respectively charged upon and issuing out of all and singular my freehold, copyhold or customary, and leasehold hereditaments at —— and ——, and shall not be charged or chargeable upon any other part of my real or personal estate, and shall respectively be payable in equal portions quarterly in every year, during the continuance thereof respectively, with a proportional sum for any fractional portion of a quarter of a year which may happen immediately to precede the day of the determination thereof respectively, the first quarterly payment of the said several annuities or rent-charges of £——, £——, and £——, to be made at the expiration of three calendar months next after my decease, and the first quarterly payment of the said annuity of £—— to be made at the expiration of three calendar months next after the decease of either of them the said [*brother-in-law and wife*], in the lifetime of the other of them, if such other should be living at the expiration of such three calendar months, and the said several proportional sums to be payable immediately on the determination of the said several annuities respectively. AND I DECLARE that the legacy duty on the said several annuities or yearly rent-charges, but no other expenses incidental thereto, shall be discharged out of my residuary personal estate. AND I HEREBY DECLARE, that, in case any one or more of the said several annuities or yearly rent-charges, or any proportional part or parts thereof respectively should, at any time or times, be in arrear and unpaid, in the whole or in part, for the space of fourteen days next after any of the said days or times hereinbefore appointed for the payment thereof respectively, then and in every such case, and so often as the same shall happen, it shall be lawful for the person or persons in whom such annuity or yearly rent-charge, or annuities or yearly rent-charges respectively, shall be legally vested, to enter and distrain for the same, and for the costs

Rent-charge to sister and her husband for joint lives;

—reduced rent-charge to survivor.

Rent-charge to brother.

Charged on copyholds and leaseholds.

Apportionment.

Legacy duty to be paid out of personalty.

Power of distress.

and expenses occasioned by the nonpayment thereof, upon all or any, or any part or parts, of the said several freehold, copyhold or customary, and leasehold hereditaments hereby charged with the payment of the said annuities or yearly rent-charges, in the same manner in all respects, and with the like consequential rights as landlords are authorised by law to do for rents reserved on common leases for years; AND ALSO, that in case any one or more of the said several annuities or yearly rent-charges, or any proportional part or parts thereof respectively, should, at any time or times, be in arrear and unpaid, in the whole or in part, for the space of twenty-eight days next after any of the said days or times hereinbefore appointed for the payment thereof respectively, then, and in every such case, and so often as the same shall happen, it shall be lawful for the person or persons in whom such annuity or yearly rent-charge, or annuities or yearly rent-charges respectively shall be legally vested, to enter into and upon, and to hold, without impeachment of waste, all or any, or any part or parts, of the said several freehold, copyhold or customary, and leasehold hereditaments, hereby charged with the payment of the said annuities or yearly rent-charges, and to retain possession, and to receive the rents and profits thereof, for his, her, and their own use respectively, until he, she, or they respectively shall thereby or otherwise be fully paid and satisfied the arrears of such annuity or yearly rent-charge, or respective annuities or yearly rent-charges which shall be due at the time of such entry, and the arrears of the same which may afterwards become due, during the time of his, her, or their respective possession or possessions of the said hereditaments, and all costs and expenses occasioned by the nonpayment thereof, at the days or times aforesaid.

Power of entry.

Rent-charge to wife, (reducible on marriage,) charged on all testator's freeholds, copyholds, and leaseholds, with power enabling annuitant to discharge part of the lands.

24*f*[1]. I GIVE AND DEVISE unto my said wife, [*name*], a yearly rent-charge of £150 during her widowhood; And in case she should marry again I GIVE AND DEVISE a yearly rent-charge of 100*l.* during the remainder of her life, unto and to the use of such person or persons as my said wife shall at any time or times, notwithstanding coverture, by any deed or deeds, extending to the whole or any part of such rent-charges, or any estate or interest therein, appoint(*a*); And, subject to any such appointment, unto and to the use of my said wife, for her sole

(*a*) [This power enables the widow when married to dispose of the rent-charge at law, without acknowledging the deed of disposition, and without the concurrence of her husband.]

and separate use. And I DIRECT AND DECLARE that the said yearly rent-charge of £150 or £100 (as the case may be) shall be charged upon and issue out of all the freehold, copyhold, or customary and leasehold hereditaments, to which I shall be entitled at the time of my decease, unless and until my said wife shall, at any time or times, whether married or sole, by any deed or deeds (*a*), declare that any of such hereditaments, or any part or parts thereof respectively, or any undivided share or shares therein, or any part or parts thereof respectively, are or is not, or have or has ceased to be charged with the said several yearly rent-charges; in which case, and so often as the same shall happen, the hereditaments or part or parts or share or shares included in such declaration shall thenceforth cease to be charged with the yearly rent-charges, or either of them, or any arrears thereof respectively, or any costs or expenses relating thereto (*b*); and the said yearly rent-charges or rent-charge (as the case may be), shall thereafter be charged upon and issue out of such of the said hereditaments or such part or parts thereof or share or shares therein only as shall not have been included in such declaration, or in any previous declaration to be so made as aforesaid; The said yearly rent-charge of £150 or £100 (as the case may be) to be payable in equal portions half-yearly, without deduction: And the first half-yearly payment of the said yearly rent-charge of £150 to be made at the expiration of six calendar months from my decease, if my said wife should then be living; And in case, on any day not

Power to declare any part of the estates discharged from the annuities.

Time of payment.

(*a*) [A writing not under seal would, if authorised by and operating under this power, be chargeable with a 35*s.* stamp duty, as a "release or renunciation of a right or interest in property." There is, therefore, no advantage in authorising the release to be made by an unsealed writing.]

(*b*) [This provision will take effect by way of executory devise, and is not within the operation of the rule which disables the grantee of a rent-charge from releasing part of the lands charged, and retaining the charge on the residue. When a legal rent-charge, created by will in the usual way, is vested in a married woman for her separate use, without the intervention of a trustee, she cannot, without the concurrence of her husband, give to a purchaser of part of the land any security against the liability to the rent-charge, because her covenant or contract will only affect her equitable interest, and would not bind a subsequent purchaser without notice taking a legal conveyance of the rent-charge. The limitations in the text are framed with a view to obviate this and other inconveniences incident to rent-charges limited in the ordinary form. Vide ante, Vol. 9, pp. 315, 363, 867.]

As to provision for discharging part of the lands from the rent-charges.

being a day of half-yearly payment, she should marry again or, without having married again, depart this life, a part of the said yearly rent-charge of £150, proportional to the fraction of a half year which shall then have elapsed, to be paid to her, her executors, or administrators, at the expiration of six calendar months (*a*) from the last preceding day of half-yearly payment, or, if no such day should have arrived, from the day of my decease, such proportional part to be for her sole and separate use; And the first half-yearly payment of the said yearly rent-charge of £100 to be made at the expiration of six calendar months from the remarriage of my said wife, if she should then be living; And in case, after having married again, she should depart this life on any day not being a day of half-yearly payment of the said yearly rent-charge of £100, a part of such last-mentioned yearly rent-charge, proportional to the fractional part of a half year which shall then have elapsed, to be paid to her executors or administrators, at the expiration of six calendar months from the last preceding day of half-yearly payment, or, if no such day should have arrived, from the day of her remarriage.

Powers of distress and entry.

$24f^2$. And I authorise and empower my said wife, her appointees, executors, administrators, and assigns, from time to time, to recover any arrears of the said yearly rent-charges, and proportional parts respectively, or any of them, which shall remain unpaid for twenty-one days after having fallen due, and also all intermediately accrued arrears, and all incidental costs and expenses, by distress, and also by entry upon and perception of the rents and profits of the said freehold, copyhold, or customary and leasehold hereditaments, or such of them, or such part or parts thereof as for the time being shall remain charged with the said yearly rent-charges or rent-charge, but as to copyhold or customary hereditaments subject to the custom (*b*). And I declare that the possession under any such entry shall be without impeachment of waste; And in making any such distress, and in dealing

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Time for payment of proportional part.

(*a*) [It seems reasonable that the terre tenant should not be called upon to pay the apportioned part before the accustomed day of payment.]

As to powers of distress and entry on copyholds.

(*b*) [This saving is not essential, but it may be useful by way of caution to the annuitant. It is presumed that when her right of entry accrued the annuitant would be entitled to admittance on paying a nominal fine, and that she could then maintain ejectment. Under an elegit, admittance is not necessary: 1 & 2 Vict. c. 120, s. 11; ante, Vol 5, p. 29.]

with the distresses taken, in addition to the powers and authorities hereinbefore given expressly or by implication, I hereby give and confer upon my said wife, her appointees, executors, administrators, and assigns, all such or the like powers and authorities as landlords have or may exercise in respect of distresses for rent-service in arrear.

Limitation of term to trustee to secure rent-charges.

24*f*[3]. And, by way of further security for the said several yearly rent-charges of £150 and £100, I give and devise all my said freehold and copyhold or customary hereditaments unto and to the use of [*annuity trustee*], of &c., his executors, administrators, and assigns, for the term of 100 years (*a*) from the day of my decease, Upon trust, from time to time, to recover any arrears of the said yearly rent-charges and proportional parts respectively, or any of them, which shall remain unpaid for thirty days after having fallen due, and also all intermediately accrued arrears, and all incidental costs and expenses, by entry upon or perception of the rents and profits of all or any of the said freehold and copyhold or customary hereditaments, [or such part or parts thereof as for the time being shall remain charged with the said yearly rent-charges or rent-charge (*b*),] or by mortgaging the same hereditaments [so remaining charged], or any part or parts thereof, and to pay over the arrears so raised to my said wife, her appointees, executors, administrators, and assigns, and, subject thereto, upon trust for the owner or respective owners of the reversion of the said hereditaments.

Demise of leaseholds for the same purpose.

24*f*[4]. And I give and bequeath unto the said [*annuity trustee*], his executors, administrators, and assigns, all my leasehold hereditaments, to hold the same to him, his executors, administrators, and assigns, for all the residues of the several terms of years which shall be subsisting therein respectively at the time of my decease (except the last two days of each such term respectively), Upon such or the like trusts, and with such or the like powers and authorities for recovering the said arrears of the said several yearly rent-charges, and all incidental costs and expenses, as are hereinbefore expressed and

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(*a*) [By limiting a term to a trustee for the annuitant, she obtains through him a remedy for recovering the rents payable by tenants whose tenancy commenced before the testator's death, and who would not be bound by the powers of distress and entry in the will, ante, p. 490, n.]

(*b*) [These words will be omitted where there is no provision for discharging part of the lands.]

declared or contained with respect to the said term of 100 years hereinbefore devised or limited out of my said freehold and copyhold or customary hereditaments; And, subject thereto, in trust for the owner or respective owners of the reversion or several reversions of the said leasehold hereditaments.

Provision for wife to be in lieu of dower.

24*f*[5]. And I DECLARE that the provision hereinbefore made for my said wife shall be accepted by her in lieu and in full satisfaction of and for all her rights and claims of or to dower or freebench, in or out of all and every or any of my freehold and copyhold or customary hereditaments.

Subject to annuities, devise of freeholds and copyholds to two sons in moieties, with cross limitations in case of lapse.

24*f*[6]. And, subject to the said several rent-charges and to the powers and authorities hereinbefore given for recovering the same, and to the said term or terms of years, and the trusts thereof, I GIVE AND DEVISE all my freehold and copyhold or customary hereditaments, &c., in manner following, (that is to say), As to one moiety or equal undivided half part thereof, TO SUCH USES, and upon such trusts, and in such manner and form as my son, [*eldest son*], shall at any time or times, by any deed or deeds, or by his last will and testament, appoint; and, subject thereto, TO THE USE of the said [*eldest son*], his heirs and assigns, for ever. But in case the said [*eldest son*] should die before me, and not leave issue surviving me(*a*), then TO THE USES hereinafter limited concerning the other moiety of the said freehold and copyhold or customary hereditaments; And as to the other moiety or equal undivided half part thereof, TO SUCH USES and upon such trusts as my son, [*second son*], shall at any time or times, by any deed or deeds, or by his last will and testament, appoint; and, subject thereto, to the use of the said [*second son*], his heirs and assigns, for ever, And in case the said [*second son*] should die before me, and not leave issue surviving me, then TO THE USES hereinbefore limited concerning the first-mentioned moiety of the said freehold and copyhold or customary hereditaments; [*or, after the limitation to each son, insert a gift over in case of death to his children at twenty-one, or marriage, and in default of such issue to the uses limited of the other moiety.*]

Bequest of leaseholds and personalty.

And I GIVE AND BEQUEATH all my leasehold hereditaments (subject as aforesaid), and all my residuary personal estate, unto my said two sons, their exe-

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(*a*) [The testator here relies on the 33rd section of the Wills Act, and assumes that the words "such issue" in that section do not mean exclusively the identical issue that was living at the death of the devisee.]

cutors, administrators, and assigns, in equal shares and proportions (*a*).

25 *a*. I DIRECT, that, (subject to any special directions contained to the contrary in my will or any codicil thereto), every annuity given by my will, or any codicil thereto, shall commence and be computed from the time of my decease, and shall be payable, clear of legacy duty and other incidental expenses and deductions, quarterly, on such days as shall be most convenient with regard to the fund or provision for the payment thereof; the first of such payments to be made on such of the said days as shall first happen after my decease, either out of the fund or funds to be appropriated for the same, or out of my general personal estate, and to be proportional to the time which shall then have elapsed from the day of my decease; [And that every annuity given to a female shall be for her separate and inalienable use during coverture; And that, if any annuitant commit or suffer any act, default, or process, which but for this condition would have the effect of giving the benefit of his or her annuity, either wholly or partially, to any other person, such annuity shall thereupon cease.] And that, in respect of every such annuity, a proportional part shall be paid, if necessary, to complete the period from the day of my decease to the day on which such annuity shall by any means (other than forfeiture) be determined; And that, if my trustee or trustees appropriate for paying any annuity or annuities a fund or funds which at the time of such appropriation shall produce a sufficient income to answer the same, such annuity or annuities shall thenceforth be exclusively charged on such fund or funds in exoneration of the residue of my estate, and shall in case of any future deficiency of the income of such fund or funds be made up out of the capital thereof.

General directions as to annuities; —to commence from testator's death; —payable quarterly.

Apportionment.

Separate and inalienable use; —cesser on alienation.

If a fund is appropriated for annuities, general estate to be exonerated.

25 *b*. I DIRECT, that, (subject to any special directions in my will or any codicil thereto to the contrary), every annuity given by my will or any codicil thereto shall be computed from my decease, and be paid half-yearly, on such days as may be most convenient with regard to the respective funds out of which the same shall be payable; And that every such

Trustees may vary times of payment.

(*a*) [There are no cross limitations of the leaseholds, and the only use of the cross limitations of the freeholds and copyholds in the supposed state of the testator's family is, to give to the surviving brother the power of appointment over the entirety.]

annuity shall be made good for the full period from the day of my decease to the day of the determination thereof (otherwise than by forfeiture), by apportionment if necessary; And that my trustee or trustees may from time to time vary the days of payment of any annuity in case a change of investment should render it convenient so to do, and in such case a proportional part shall be paid in respect of the broken period occasioned by such change.

Charge of annuities on real estate.

25 *c*. I CHARGE the annuities given, or to be given, by my will, exclusively on my real estates, and if the same be deficient, such annuities shall abate rateably.

Annuities to be free of legacy duty.

25 *d*. I DIRECT that all the annuities given by my will or any codicil thereto shall be provided for and paid to the respective annuitants clear of legacy duty (*a*) and all other expenses.

PECUNIARY BEQUESTS.

Legacy for wife's immediate use.

26 *a*. I ALSO GIVE AND BEQUEATH to my said wife the sum of £——, to supply her immediate occasions, and which I direct shall be paid to her within fourteen days after my decease (*b*).

Legacies to wife: one to be paid immediately.

26 *b*. I GIVE to my wife, [*name*], £——, to be paid immediately after my decease; I ALSO GIVE to her £——, to be paid within eighteen months after my decease, with interest at the rate of £5 per centum per annum from my decease, payable quarterly in the meantime.

26 *c*. I GIVE £—— to my wife, to be paid to her within one calendar month from my decease; AND, if she marry again, I give £—— to her for her separate use.

Pecuniary legacies—to wife;

—to trustees;

—to one of the trustees;

—to servants.

26 *d*[1]. I BEQUEATH the pecuniary legacies following: namely, To my said wife the sum of £——, for her immediate use; To each of my said other trustees and executors the sum of £——, as an acknowledgment for his trouble in executing the office of trustee and executor of my will; To the said [*name*] individually, and without reference to his office of trustee and executor, the sum of £——; To each of the domestic servants who shall be in my service at my decease one year's wages, (in addition to what may be then due to them

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(*a*) [Vide ante, p. 468, n.(*b*).]

(*b*) An immediate pecuniary legacy to the testator's widow is always a proper concomitant of a residuary gift for life, or other provision which may not be immediately available.

for wages), and a suit of mourning at the discretion of my executors; To &c., (*other pecuniary legacies*). And I direct the legacy hereinbefore bequeathed to my said wife to be paid or retained out of the first monies which shall come to the hands of my trustees and executors, and the other legacies hereinbefore bequeathed, to be paid or retained (clear of legacy duty) at the end of one year from my decease, unless my executors should think fit sooner to pay or retain the same. Time of payment.

26 *d*[2]. And in case of a deficiency of assets for the full payment of all the pecuniary legacies hereinbefore bequeathed, I direct that they shall be respectively paid in full in the order of priority in which they are hereinbefore given, so far as the assets applicable for the payment thereof will extend. Priorities of legacies.

26 *e*. I give and bequeath to my wife, [*name*], the sum of £——, to be paid to her by four equal instalments, the first immediately after my decease, and the others at the end of three, six, and nine calendar months respectively after my decease. Legacy to be paid by instalments.

27 *a*. I give and bequeath unto my friends, [*executors*], the sum of £—— each, as a mark of my esteem, and in consideration of the trouble they will have in executing the trusts of this my will (*a*). Legacies to executors as such.

27 *b*. I give to each of my said executors, who shall prove my will, the sum of nineteen guineas (*b*).

(*a*) It is always better to shew explicitly, as here, whether legacies to trustees are or are not to be regarded as given to them as a compensation for their trouble, in order to exclude questions respecting their claim in case they renounce [or neglect, or from mental or bodily infirmity are unable to undertake,] the trusts, [or in case their appointment is revoked by the testator, see *Burgess* v. *Burgess*, 1 Coll. 367.] The general rule seems to be against their title in such a case, [except in the case of a *residuary* gift, *Griffiths* v. *Pruen*, 11 Sim. 202; *Christian* v. *Devereux*, 12 Sim. 264,] unless the testator has shewn, by positive expression, that the legacy was intended to be independent of the office: *Read* v. *Devaynes*, 3 B. C. C. 95, 2 Cox, 285; *Stackpoole* v. *Howell*, 13 Ves. 417; *Hanbury* v. *Spooner*, 5 Beav. 630. See *Dix* v. *Reed*, 1 Sim. & Stu. 237; *Compton* v. *Bloxham*, 2 Coll. 201. As an executor may act before probate, however, his death without having proved the will does not necessarily defeat his claim to a legacy, though given expressly for his trouble: 4 Ves. 212. [See *Hollingworth* v. *Grasett*, 15 Sim. 52. A legacy to executors for their trouble defeats their claim to commission on Indian assets: *Freeman* v. *Fairlie*, 3 Meriv. 24; *Sheriff* v. *Axe*, 4 Russ. 33.] As to legacies to trustees.

(*b*) [Legacies under £20 are not subject to legacy duty, so that a Legacies under £20.

Legacies to trustees, &c.

27 *c.* I GIVE unto [*trustees*], of &c., £—— each, as some compensation for the trouble they may have in the execution of the trusts of this my will. I GIVE unto my first (*a*) cousin, [*name*], of &c., £——, as a token of my affectionate regard. AND I GIVE unto the said [*one of the trustees*], of &c., £——, as a mark of my esteem, and in grateful recollection of his many friendly and professional services (*b*). AND I DIRECT the said legacies to be paid within three months after my decease, clear of legacy duty.

Legacy to trustee irrespective of office.

27 *d.* I GIVE to [*trustee*], whether he shall accept the trusts of my will or not, the sum of £——.

Executors to choose each a book from testator's library.

27 *e.* I APPOINT the said [*trustees*] to be my executors and trustees, entreating each of them to choose a book, of one or more volumes, from my library, as a token of remembrance; the priority of choice, in case of their selecting the same work, to be determined by lot.

Legacies to friends for mourning rings.

28. I GIVE AND BEQUEATH to my friends, [*names*], the sum of £—— each, for the purchase of mourning rings (*c*).

Legacies to clerks, servants, &c.

29 *a.* I GIVE AND BEQUEATH unto such of my clerks, [*names*], as shall be in my service or employ at the time of my decease, the sum of £—— apiece, to be paid at the end of three calendar months next after my decease.

29 *b.* I GIVE AND BEQUEATH to each of the domestic servants who shall be in my service at my decease, the amount of one year's wages, in addition to such wages as he or she shall be entitled to, and such mourning as my executors shall think fitting.

29 *c.* I GIVE AND BEQUEATH to each of my domestic servants, who shall be in my service at the time of my decease, having been in my service for not less than two years, the sum of £——, [*or*, the amount of one year's wages], in addition to any wages owing to such servant.

29 *d.* I GIVE AND BEQUEATH unto my servants, [*names*], if

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legacy of nineteen guineas to a stranger is worth more to him by 1*l.* 19*s.* than a legacy of £20.]

(*a*) [Vide infra, p. 509, n. (*a*).]

(*b*) The reason here assigned for the legacy would entitle the legatee to receive it, whether he proved the will or not.

(*c*) Legacies for mourning rings are undistinguishable from other pecuniary legacies in regard to their carrying interest, &c : *Apreece* v. *Apreece*, 1 Ves. & Bea. 364.

they should be in my service at the time of my decease, the sum of £10 each. I GIVE AND BEQUEATH to each of the servants who shall be in my service at the time of my decease, and shall have lived with me continuously three years or upwards, two years' wages; And to each of the other servants who shall be in my service at the time of my decease, and shall have lived with me continuously one year or upwards, one year's wages, in addition to what may be due and owing to them respectively on account of wages at the time of my decease (*a*). I GIVE AND BEQUEATH to the servant who shall be my valet at the time of my decease, such of my clothes and wearing apparel as my executors shall think most suitable.

30 *a*. I GIVE to my trustees or trustee £——, upon trust thereout to pay or apply, for the benefit of [*name*], widow, the sum of —*s*. weekly, [monthly], during her life, or until such sum shall be exhausted; such payment to commence from the day of my decease; And after her decease to apply all or a competent portion of the surplus (if any) for her decent burial, and to add the ultimate surplus (if any) to my residuary personal estate.

£—— to be paid to M. N. by weekly instalments;

—surplus for her burial.

30 *b*. I GIVE AND BEQUEATH the sum of £—— to the trustees of my will, to be held by my trustees or trustee for the time being, IN TRUST for my son, [*name*], and to be paid to

Pocket money for son.

(*a*) A legacy to servants applies to such only as spend their whole time in the testator's service, and not to one who is occasionally employed only, such as a steward of courts: *Townsend* v. *Windham*, 2 Vern. 546. [But a farm bailiff is a servant within the meaning of such a gift: *Bulling* v. *Ellice*, 9 Jur. 936.] It has been held not to extend to a coachman supplied by a job master, for he is not the testator's servant: *Chilcott* v. *Bromley*, 12 Ves. 141. [See *Howard* v. *Wilson*, 4 Hagg. 107. Where, by a codicil, a testator gave "to the following persons who have lived many years in my family: viz., to Mrs. D., £1000, to Mr. J., £1000, to Mr. F., £1000; to the other servants £500 each," it was held that a servant who was in the testator's service at the date of the codicil, but had quitted it before the testator's death, was entitled: *Parker* v. *Marchant*, 1 You. & C. C. C. 290. But generally, under gifts to servants, those only can take who were in the testator's service when he died: *Jones* v. *Henley*, 2 Ch. Rep. 162. A temporary absence from actual service at the time of the testator's death will not disentitle a servant to the benefit of the legacy: *Herbert* v. *Reid*, 16 Ves. 486.]

A legacy of a year's wages is confined to such servants as are hired by the year: *Booth* v. *Dean*, 1 Myl. & Kee. 560.

As to legacies to servants.

him for pocket money during his minority in such portions, or to be otherwise applied for his benefit in such manner, as my said trustees or trustee for the time being shall think proper; And in case of all or any part of such sum not being applied as aforesaid during my said son's minority, such sum, or the unapplied part thereof (as the case may be), shall be paid to him on his attaining the age of twenty-one years, and in case of his dying before me, or under that age, shall form part of my residuary personal estate. AND I DIRECT AND DECLARE that the interest and annual produce or income (if any) to arise from the said sum of £——, or any part thereof, shall be added to the capital and be applicable in all respects as part thereof.

Legacy to a creditor.

31. I GIVE AND BEQUEATH to [*legatee*] the sum of £——, to be paid to him in addition to the amount of any debt I may owe to him at my decease.

Legacy to son; (liable to lapse).

32 *a*. I GIVE to my son, [*name*], in case he should survive me (*a*), the sum of £——, to carry interest from the time of my death.

Legacy to vest at twenty-one, without interest.

32 *b*. I GIVE to my nephew, [*name*], the sum of £——, to be vested in and payable to my said nephew, if and when he shall attain the age of twenty-one years, but without interest in the meantime.

Legacy to carry interest.

32 *c*. I GIVE AND BEQUEATH unto my brother, [*name*], the sum of £—— sterling, to be paid as soon as convenient after my decease; Such legacy, if not paid within six calendar months, thenceforth to carry interest at the rate of £4 per centum per annum.

Pecuniary legacy to testator's niece for her separate use.

32 *d*. I GIVE AND BEQUEATH unto my niece, [*name*], wife of ——, the sum of £——, to be paid to her within six calendar months next after my decease; And I declare that the said sum of £—— shall be for her sole and separate use and benefit, [and that her receipt, notwithstanding her present or any future coverture, shall be a valid and effectual discharge for the same (*b*)].

(*a*) [This provision is necessary if the testator does not intend that the representatives of the son should take the legacy in the event of his dying before the testator and leaving issue surviving the testator. See Stat. 7 Will. 4 & 1 Vict. c. 26, s. 33, ante, p. 427.]

(*b*) [This usual declaration is quite superfluous, and indeed might

32 *e*. I GIVE AND BEQUEATH unto [*trustee*], the sum of £——, to be paid at the end of twelve calendar months next after my death, with interest for the same at the rate of £5 per centum per annum from the day of my death, IN TRUST, nevertheless, for the sole use and benefit of my sister, wife of ——, and to be disposed of as she shall by any writing or writings, signed by her, order and direct, free from the debts, control, and engagements of her present or any future husband; [For which purpose I DIRECT that the receipts in writing of the said [*sister*], or any her appointee or appointees as aforesaid, shall, notwithstanding her present or any future coverture, be good and effectual discharges for her said legacy or sum of £——, and the interest thereof or any part thereof respectively.]

Legacy to a trustee for the separate use of sister.

32 *f*. I GIVE AND BEQUEATH unto my niece, [*name*], in case she should not have married in my lifetime (*a*), the sum of £—— sterling.

Legacy to niece if she have not married.

32 *g*. I GIVE AND BEQUEATH to A. B. the sum of £—— sterling, with interest thereon from my decease, to vest in him on his attaining the age of twenty-one years, and not before. And if he should die before me, or under the age of twenty-one years, I GIVE AND BEQUEATH the same sum of £—— and interest to C. D., to be vested in him on his attaining the age of twenty-one years and not before.

Legacy at twenty-one;

—gift over in case of lapse or death under age.

33. I GIVE to [*legatee*], of &c., the sum of £——, the same to be a vested and transmissible interest immediately, but to be paid when he shall attain the age of twenty-one years, and interest thereon, at the rate of £4 per cent., from my decease, to be applied in the meantime by my trustees or trustee for his benefit. [AND I charge the last-mentioned legacy and interest on my hereditaments at ——, as an auxiliary security, whether the said [*legatee*] die before the day of payment or not (*b*).]

Legacy [charged on land] to be paid at twenty-one, but to vest immediately.

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with equal reason be inserted into the gift of a legacy to an unmarried woman or to a man. A declaration that the receipt of a married *infant*, for her separate property, should discharge the trustees notwithstanding her *infancy*, would not be surplusage.]

(*a*) [The testator here assumes, that, in case of her marriage, he will have given her the amount as a marriage portion.]

(*b*) [This last proviso is made superfluous, according to the case of *Watkins* v. *Cheek*, (2 Sim. & Stu. 199), by the previous declaration as to vesting. But generally, where a legacy, payable at a certain age, is

Legacy to be refunded on succeeding to a certain estate.

34. I GIVE AND BEQUEATH unto my nephew, [*name*], the sum of £——, but upon condition that he shall refund the same, without interest, for the benefit of my residuary estate, in case at any time he should become tenant in tail in possession of the estates comprised in the marriage settlement of my brother, [*name*]. AND I DIRECT that the same legacy shall not be paid to my said nephew until he shall have delivered to my executors or trustees or trustee for the time being an undertaking or agreement, that, in case of his so becoming tenant in tail of the same estates, he will immediately refund the said legacy, and that the said estates shall be charged with the repayment thereof (*a*).

Legacy to son, to be vested at twenty-two, and the interest in the meantime to be applied for maintenance, with power to apply principal for his advancement.

35. I GIVE AND BEQUEATH unto my son, [*name*], in case he should attain the age of twenty-two years, the sum of £—— sterling, to be paid to and to be an interest vested in him at his age of twenty-two years, and not before. AND I DIRECT, that interest on the said sum, after the rate of £5 per centum per annum, shall, in the meantime, from my decease until my said son shall attain the age of twenty-two years or die under that age, be paid and applied to and for the maintenance and education of my said son. AND I FURTHER DIRECT, that it shall be lawful for my said trustees or trustee for the time being, with the consent of my said wife, to be testified by writing under her hand, but if my said wife should be then dead, in the proper discretion of my said trustees or trustee for the time being, to advance and pay the said sum of £—— or any part thereof for the benefit or advancement in the world of my said son, notwithstanding that he may then be under the age of twenty-two years. AND I GIVE AND BEQUEATH to my said son, [*name*], the sum of £—— sterling,

Second legacy to the son to be vested at

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charged on real estate, and no right of entry (which amounts to a chattel interest transmissible at law to the executors, *Hodgson* v. *Rawson*, 1 Ves. sen. 44) is given, and the legatee dies under the prescribed age, the charge lapses as to the real estate, though it vests as to the personalty. See *Sherman* v. *Collins*, 3 Atk. 319; *Sandford* v. *Irby*, 4 Law J., O. S., Ch., 23.]

Conditional legacy.

(*a*) [An immediate legacy, conditioned to be void in a certain event, will be paid to the legatee without his being required to give security to refund it: *Fawkes* v. *Gray*, 18 Ves. 131. But see *Colston* v. *Morris*, 6 Mad. 59. Such an agreement as that above required will, if unsealed, be liable to the agreement stamp only, and not to the stamp on a mortgage, or on a "declaration of trust not otherwise charged."]

in addition to the legacy hereinbefore bequeathed to him. AND I direct that the said legacy of £—— shall be an interest vested in my said son at his age of twenty-four years, and not before, and shall be paid to him without interest on his attaining that age, if the same should happen after the decease or marriage of my said wife; But if the same should happen during her widowhood, then the raising and payment of the said legacy of £—— shall be postponed till after the decease or marriage of my said wife, whichever shall first happen.

twenty-four, but not payable till the death or marriage of wife.

36 *a*. I GIVE £—— to my brother-in-law, [*name*], (who is a son of my uncle [*name*]) (*a*), or, if he should die before me, to his executors or administrators (*b*), to be disposed of by them in all respects as if it had formed part of his general personal estate not specifically disposed of by his will; [*or*, as if the same had vested in my said nephew immediately before his decease,] and their receipts to be sufficient discharges for the same.

Legacy to A. B. not to lapse.

36 *b*. I GIVE to my niece, [*name*], for her separate use, and if she die before me, to such person or persons as would have been entitled thereto in case she had died immediately after my decease (*c*), the sum of £——, to be paid clear of legacy duty, within eighteen months after my decease, with interest at four per cent. in the meantime from the day of my decease, to be paid quarterly.

36 *c*. I GIVE £—— to [*legatee*], of &c., or, if he should die before me, to such his child or children [and such issue of any his child or children dead before me] as shall be living at my decease and shall attain the age of twenty-one years or marry, if more than one, in equal shares, [as between brothers and sisters; But so that the child or the children collectively of any deceased child shall only take such share as his, her, or their parent would have taken if living.]

Legacy to A. B. Substitution of children or issue in case of lapse.

(*a*) [Whenever a legacy, either specific or pecuniary, is given to a relation, the fact and degree of relationship should be stated, as the statement in the will is always acted upon at the Stamp Office without further evidence.]

Relationship of legatee should be stated.

(*b*) [It is proper to direct payment to the personal representative for the convenience of administration, and in order to exonerate the present testator's executors from the responsibility of seeing to the application of the legacy.]

(*c*) [This is an adoption of the provision in the 33rd section of the stat. 7 Will. 4 & 1 Vict. c. 26. See Sweet's Concise Precedents, 2nd ed., 339, n.]

Legacy in trust for the family of a son who is or may become bankrupt, &c.;

37 *a*[1]. I GIVE AND BEQUEATH the sum of £—— to my said trustees, IN TRUST to pay and apply the said legacy or sum of £——, and the annual produce and income therefrom, or either of them, or any part or parts thereof respectively, unto and for the benefit of the wife and children for the time being of my son [*name*], or of some or one of them, for such interest or interests, and with such conditions and restrictions, and in such manner in all respects as my said son shall direct or appoint; But as to any such wife for her separate use; And in default of such direction or appointment, and, subject thereto, and in the meantime until any such direction or appointment shall be made, UPON TRUST to pay and apply the said legacy and the annual produce thereof, or so much of the said legacy and annual produce as shall not have been directed or appointed by my said son as aforesaid, [either] unto and for the benefit of the wife and children for the time being of my said son, in equal shares and proportions; [or unto and for the benefit of the said wife and children, or some or one of them, and in such proportions, for such interest or interests, and with such conditions, restrictions, and provisoes, and in such manner and in all respects as my said trustees or trustee for the time being, in their, his, or her absolute discretion, shall think proper (*a*)]; and if there should be only one of such objects, then unto and for the benefit of such only object, and as to any such wife for her separate use.

—as son shall appoint;

—or as trustees shall appoint.

Power to invest.

37 *a*[2]. AND I DIRECT, that, in case my said trustees or trustee for the time being should deem it expedient to invest the said legacy for the benefit of any of the objects of the aforesaid trusts, such investment shall be made either in the public stocks or funds of Great Britain, or on mortgage of freehold, copyhold, or leasehold estates in England or Wales; AND I EMPOWER my said trustees or trustee from time to time to vary such investment as often as shall be deemed expedient.

Legacy in trust for improvident son.

37 *b*[1]. I GIVE AND BEQUEATH to my said trustees the sum of £——, IN TRUST to invest the same in the names or name of my said trustees or trustee for the time being in the public funds, or on real security in England or Wales, with power for my said trustees or trustee from time to time to vary any such investments; And to be possessed thereof in trust to pay

Income for son

(*a*) If it is not intended that the trustees should have such a discretion, omit the clause in brackets. In some cases it would be advisable to provide for the event of there being no wife or child at the death of the testator.

the income therefrom unto my son [*name*], until he shall commit or suffer some act, default, or process, which but for this limitation would have the effect of giving the benefit of such income either wholly or partially to any other person or persons; and thenceforth during the life of my said son, to pay or apply the said income to or for the benefit of the wife and child or children for the time being of my said son [*name*], or such one or more of them, and in such shares, if more than one, and in such manner as my said trustees or trustee shall think fit, and as to my son's wife for her separate use; And while there shall be no such wife or child, then to invest and accumulate the income in augmentation of the capital of the said legacy or trust-fund, but with power to resort to such accumulations before or after my said son's death, as if the same were income; And if and when such accumulations shall cease to be lawful, to apply the future income in the manner in which it would be applicable if my said son [*name*], were dead; And after the decease of my said son, to pay the income from the said legacy or trust-fund to his widow (if any) for her separate use; And after her decease to transfer or divide the capital of the said legacy or trust-fund to or among such of his children as shall attain the age of twenty-one years or marry, in equal shares if more than one.

until alienated, then for son's wife and children, as trustees shall think fit;

—if no wife or child, to accumulate.

After son's death for widow for life, then for children at twenty-one or marriage.

37 *b*[2]. With power in the meantime (subject to the life interest of any such widow) to apply the income of each child's expectant share, or any part thereof, for or towards his or her maintenance and education, and to accumulate any surplus income, and add the same to the capital of the share from which it shall proceed, but with power to resort to any such accumulations for the maintenance or education of the person or persons presumptively entitled thereto; And with power also, in the lifetime of my said son [*name*], or of his widow, with his or her consent in writing, and after the decease of my said son and of his widow (if any), at the discretion of my said trustees or trustee, to apply not more than one moiety of the presumptive share or shares of any child or children of my said son, for his, her, or their advancement in the world; And if no child of my said son should take a vested interest in the said legacy or trust-fund, then, subject to the trust aforesaid, the sum shall be held in trust for (*ulterior trusts*).

Maintenance.

Advancement.

37 *c*. I GIVE AND BEQUEATH to my said trustees the sum of £——, IN TRUST to invest the same, or so much thereof as for

Legacy in trust for improvident son, his wife

and children,—the income and capital being applicable during the son's life as trustees shall think fit.

the time being shall not be applied under the trusts hereinafter declared, in the name or names of my said trustees or trustee, in such manner and in or upon such investments or securities of any kind whatsoever and at any rate of interest as they, he or she shall think fit, or, in their or his discretion, in the purchase from Government or any public company, or, on sufficient freehold, copyhold or leasehold security, from any private person or persons, of an annuity or annuities, absolute or redeemable, for the life of my son, [*name*], or for the life of the survivor of my said son and his wife for the time being; With power from time to time to vary any such investments. And I AUTHORISE AND EMPOWER my said trustees or trustee for the time being, from time to time, if and when and at such times and in such manner as they, he or she, in their, his or her absolute discretion, shall think fit, to pay or apply the annual produce and income of the said legacy or trust-fund, or any part or parts, or the whole of the capital thereof, to or for the benefit of my said son and his wife and child or children (if any) for the time being, or such one or more of them, and in such shares, if more than one, as my said trustees or trustee shall think fit, and as to my son's wife, for her separate use; And to invest and accumulate so much of the annual produce and income from the said legacy or trust-fund as shall not for the time being be so applied, or the whole thereof if no part thereof shall be so applied, and add such accumulations to the capital thereof, with power to apply the same in manner aforesaid; and, if and when such accumulations shall cease to be lawful, to pay or apply the future income to or for the benefit of my said son, his wife and child or children for the time being, (and as to his wife for her separate use), or some or one of them. And after the decease of my said son to pay the income from the said legacy or trust-fund, or from so much thereof (if any) as shall not have been applied under the trusts and powers hereinbefore contained, to his widow (if any) for her separate use, and after her decease to transfer or divide the capital of the said legacy or trust-fund, or so much thereof (if any) as shall not have been applied as aforesaid, to or among such of his children as shall attain the age of twenty-one years or marry, in equal shares if more than one. (*Add maintenance and advancement clauses, see* (37 *b*²)).

Accumulation.

After son's death any surplus to be for widow for life, and then for children.

Legacies to

38 *a*. I GIVE to each of my children who shall survive me

and shall attain the age of twenty-one years or [being a daughter] marry, the sum of £——. In case any child or children of mine should have died before me [or, being a son, should die under the age of twenty-one years (*a*)], leaving a child or children surviving me, who shall attain the age of twenty-one years or [being a daughter or daughters] marry, I GIVE to such child or children of each such deceased child of mine the sum of £——, and if more than one, in equal shares. (*Add provision for maintenance,* (38 *b.*)).

children to vest at twenty-one or marriage.

Substitution of children of deceased child.

38 *b.* AND I DIRECT my said trustees or trustee for the time being, out of the annual produce and income of my residuary [real and] personal estate, to apply, in their or his discretion, in or towards the maintenance and education of each of my children and grandchildren who shall for the time being be presumptively entitled to a legacy or portion under my will, and shall be under the age of twenty-one years and [being a daughter or granddaughter] unmarried, an annual sum, after the rate of not more than £5 per centum per annum on the amount of such child's or grandchild's expectant or presumptive legacy or portion, and in case less than that amount should be so applied in any one year, to invest and accumulate the surplus in the public stocks or funds, or on real security, with power to vary such investments, and to resort to such accumulations at any future time for the maintenance or education of the child or grandchild from whose allowance the sum shall have arisen; And when any such child or grandchild shall die or attain his or her majority or [being a girl] marry, the said allowance for his or her maintenance and education shall cease; and any unapplied surplus and accumulations of such allowance shall [in case of the death of such child or grandchild under age and [being a girl] unmarried,] sink into the residue of my personal estate; [but in case such child should attain the age of twenty-one years [or being a girl] marry, such surplus accumulations shall thereupon be paid over to him or her, for his or her own use and benefit.] (*Add, if thought expedient, power of advancement,* (38 *c.*)).

Gift for maintenance of legatees whose legacies do not vest during minorities.

38 *c.* AND I HEREBY AUTHORISE AND EMPOWER my said trustees or trustee for the time being, in their or his absolute discretion, during the minority of any child or grandchild of

Power to advance expectant legacies.

(*a*) [These words are proper when the sons do not take vested interests on marriage under age.]

mine, to raise and apply any part, not exceeding one-half, of the principal or capital of such child or grandchild's expectant or presumptive legacy or portion for his or her advancement or preferment in the world, or otherwise for his or her benefit, in such manner as my said trustees or trustee shall think proper.

Legacies to children, with interest.

38 *d*. I GIVE AND BEQUEATH to each of my children the sum of £—— sterling, with interest thereon, at the rate of £5 per centum per annum, from the day of my decease. (*Add direction for investment, &c., during minorities,* (38 *g*[1]).)

38 *e*. I GIVE AND BEQUEATH unto each of my sons the sum of £—— sterling, with interest thereon, at the rate of £5 per centum per annum, from the day of my decease. AND I GIVE AND BEQUEATH unto each of my daughters the sum of £—— sterling, with interest thereon, at the rate aforesaid, from the day of my decease. (*Add direction for investment, &c., during minorities,* (38 *g*[1]).)

Pecuniary legacies:
1. To wife.

2. To each child, including a natural daughter.

38 *f*. I GIVE AND BEQUEATH the several pecuniary legacies following, that is to say, First, I GIVE to my said wife the sum of £——, to be paid to her immediately after my decease. Secondly, I GIVE to each and every of my children now born and hereafter to be born, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry (including my daughter [*illegitimate daughter*], who resides with me, and is now aged —— years, or thereabouts (*a*),) the sum of £—— apiece, the same several legacies to be paid as soon as circumstances will permit after my decease, and to bear interest from the day of my death at £4 per centum per annum. (*Add direction for investment, &c., during minorities,* (38 *g*[1]).)

As to describing illegitimate children;

(*a*) [Any description sufficient to identify the person is sufficient, without disclosing the fact of illegitimacy, ante, p. 344. But where the fact is not generally known, and it is desired to prevent any suspicion of it from arising, it is better to extend the same particularity of description to all the children, thus :—

Children now born, and future children.

"I GIVE to each of my five children now born, namely [*names of legitimate children and of illegitimate child*], and to every other child of mine hereafter to be born."

In subsequently referring to the children as a class, it is not necessary again to particularise the illegitimate child, because the testator has already put a construction on the words "my children," and shewn that he means it to include that child.]

38 *g*[1]. And I direct, that the legacies of such of my children as at the time of my decease shall have attained the age of twenty-one years, or [being a daughter or daughters] shall be married, shall be paid to them respectively within twelve calendar months after my decease; and that the legacies of such of my children as shall, at the time of my decease, be under the age of twenty-one years and [being a daughter or daughters] unmarried, shall be invested by the trustees or trustee for the time being of my will, in the names or name of such trustees or trustee, in the public stocks or funds of Great Britain, or on real security in England or Wales, and not in Ireland, with power for my said trustees or trustee for the time being, from time to time, to vary such investments; And the annual produce and income thereof, and the interest hereinbefore directed to be paid on such legacies, or such part thereof respectively as my said trustees or trustee shall deem sufficient, shall from time to time be applied by such trustees or trustee for the maintenance and education of such last-mentioned child or children respectively, during his, her, or their minority or respective minorities, or until such child or children respectively [being a daughter or daughters] shall marry; And the surplus thereof (if any) shall from time to time be invested and accumulated, but such accumulations may at any future time be resorted to for the maintenance of the child from whose legacy the same shall have arisen; And the capital or principal of such legacy or respective legacies, together with any unapplied surplus and accumulations of the annual produce and income thereof, shall be paid or transferred to such child or children respectively, when and as he, she, or they respectively shall attain the age of twenty-one years, or [being a daughter or daughters] marry. [And I further direct and declare, that it shall be lawful for my said trustees or trustee for the time being, at their or his own discretion, during the minority or respective minorities of any of my said children, to apply any part, not exceeding one-half of the principal or capital of the said legacies respectively hereinbefore bequeathed to such child or children, in or towards his, her, or their advancement or preferment in the world, or otherwise for the benefit of such child or children respectively, in such manner as my said trustees or trustee shall think proper.] And in case any of my said children depart this life under the age of twenty-one years, and [being a daughter or daughters] without having been married, then I direct, that the legacy or legacies hereinbefore

Investment of legacies during minorities.

Maintenance.

Accumulation.

Time of payment.

Advancement.

Legacies of children dying under age and unmarried to sink into residue.

bequeathed to such child or children respectively, together with any surplus and accumulations of the annual produce and income thereof, shall [(subject, nevertheless, to any advancement or advancements which shall or may have been made thereout as aforesaid),] sink into and constitute a part of my residuary personal estate. (*Add clause* (38 *g* [2]), *substituting children of any child dying before testator*).

Proviso substituting children of deceased legatees.

38 *g*[2]. PROVIDED ALWAYS, that, in case any child of mine should die before me [or (being a son) should survive me and die under the age of twenty-one years (*a*)], and any child or children of any such child of mine should be living after my decease, then, and in every such case, I GIVE AND BEQUEATH the legacy hereinbefore intended for such child of mine so dying, with interest thereon as aforesaid, [and in case of a son of mine surviving me and dying under age, any surplus or accumulated income accrued during such son's life,] unto such his or her child or children, and if more than one, in equal shares and proportions (*b*). AND I DECLARE that the provisions and declarations hereinbefore contained as to the time of payment of the legacies hereinbefore given to my children, and as to the investment thereof in the meantime, and the application and disposition of the income therefrom [and as to advancements out of the same legacies], and as to the sinking into the residue of the legacies intended for any legatees who shall die under the age of twenty-one years, or [being a daughter or daughters] unmarried, shall apply and extend to such grandchild or grandchildren of mine as aforesaid, and the legacies hereby given to him, her, or them.

Pecuniary legacy among children nominatim, equally. (Variation where the gift is to some of the children only).

38 *h*[1]. AND I GIVE AND BEQUEATH the sum of £—— unto my [six other] children, [*names*], equally to be divided among them, share and share alike, and to be paid to them respec-

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(*a*) [These and the subsequent words will be omitted if the son's legacies are made payable on marriage under age.]

As to providing against lapse of gifts to children.

(*b*) [The 33rd section of the Statute of Wills would furnish, in many cases, a sufficient provision against lapse by the death of a child of the testator leaving issue. But where the legacy is limited not to vest, or not to be raised except on certain conditions or in certain events, or when it is intended only to admit the issue of the deceased legatee, and to exclude his creditors and any parties who might claim under his will, or collaterally as next of kin of a child of the legatee dying in infancy, the legacy should be expressly given to the issue by substitution, which will exclude the operation of the 33rd section.]

tively at the end of twelve calendar months next after my decease, but without interest in the meantime; but the respective shares of my said [six] children to be interests vested in them respectively immediately upon my decease. AND in case any of my said [six] children should not have attained the age of twenty-one years or (being a daughter or daughters) have previously married (with the consent of my said wife, if living) at the expiration of the said twelve calendar months next after my death, then, and in such case, I DIRECT, that the share or proportion of each such child who shall not have attained the said age or (being a daughter) have sooner married as aforesaid, of and in the said sum of £——, shall be invested and laid out in the public stocks or funds, or on real securities in England or Wales, in the names or name of my said trustees or trustee for the time being [*or*, the trustees or trustee for the time being of my residuary personal estate], (and whom I empower to change the securities as often as it shall be deemed expedient so to do), IN TRUST for such respective child of mine who shall be under age and (being a daughter) unmarried as aforesaid, and to be transferred to such child upon his or her attaining his or her said age of twenty-one years, or (being a daughter) on her marriage with the consent of my said wife, if living, as aforesaid; And the dividends and interest thereof shall be paid and applied in or towards his or her maintenance, support and education during his or her minority, in such manner as the said trustees or trustee shall think proper, or in the case of a daughter until her marriage.

Shares of children under age to be invested, and the income applied to their maintenance, and the surplus to accumulate.

38 h^2. PROVIDED ALSO, that in case any of my said [six] children [lastly mentioned] should die in my lifetime or (being a son or sons) under the age of twenty-one years, leaving a child or children (*a*) who shall be living after my decease,

Substitution of issue of children dying before testator.

(*a*) This clause, it will be observed, lets in, by way of substitution for the deceased legatees, their children merely, and not issue generally; so that it would not embrace the share of a child dying in the testator's lifetime leaving a grandchild but no child. In using the words "issue" and "children," attention should always be paid to their respective and various import. If, by the word "issue," the testator meant to designate issue of every degree, the intention should be declared in so many words, or, at all events, every expression which might give rise to an argument for restricting the word "issue" to children should be carefully avoided. On the other hand, if the testator's bounty is intended for children exclusively, the objects of the gifts should be invariably

Respective extent of the words "children" and "issue."

and who shall live to attain the age of twenty-one years or (being a daughter or daughters) marry under that age, then, and in such case, it is my will that the child or children attaining the said age or (being a daughter or daughters) marrying, of each such child so dying in my lifetime, or (being a son) under the age of twenty-one years, shall represent and stand in the place of his, her, or their deceased parent, and shall be entitled to the same share or shares, as well original as accruing, in the said legacy or sum of £——, which his, her, or their deceased parent would have been entitled to, if living at the time of my decease and attaining the age of twenty-one years or (being a daughter) marrying; and such share and shares to be divided between or among such children, if more than one, in equal proportions, and if there should be only one child, then to go to such only child; And if any child or children of any such deceased child of mine should be under the age of twenty-one years, the annual income arising from the expectant or presumptive share of each such minor in the said legacy of £—— shall be applied by my said trustees or trustee in and for his or her maintenance and support. PROVIDED ALSO, and I further declare, that in case any of my said [six] children should die in my lifetime or (being a son or sons) under the age of twenty-one years, and no child of any such child should be living after my decease and attain the age of twenty-one years or (being a daughter) marry, or in case any of my said [six] children (being a daughter or daughters) should die under the age of twenty-one years and unmarried, then, and in every such case, the share or respective shares [as well original as accruing (*a*),] of my child or children respectively so dying, of and in the said legacy or sum of £——, shall be held UPON TRUST for such of my other children or their issue as shall eventually become entitled, under the limitations hereinbefore contained, to participate in and to receive actual payment of the other shares or share of the said legacy or sum of £——,

Clause of accruer as to the shares of children dying in testator's lifetime or under age.

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described and referred to by the word "children," in preference to "issue," as more completely preventing misconstruction. It seems, that where the share to which issue are to succeed is described as their *parents'* share, the testator is considered to have explained himself to employ the word "issue" in the sense of *children: Sibley* v. *Perry*, 7 Ves. 522.

(*a*) [These words will not be required unless the variation in note (*a*), p. 519, is adopted.]

and, if more than one, in the like shares and proportions (*a*). (*Add, if thought expedient, power to advance the shares of children or grand-children,* (38 *c*)).

38 *h*[3]. And I direct, that my said wife shall have and be entitled to interest after the rate of £5 per centum per annum, upon or in respect of the said sum of £—— hereinbefore by me bequeathed as aforesaid, or such part of the said sum of £—— as I shall not have advanced to my said children as hereinafter mentioned, which shall accrue between my death and the expiration of the said twelve calendar months when the said several legacies will become payable, to the intent that my said wife shall, by and out of such interest, provide for the maintenance and education of my said children, or for whose benefit the same bequests are hereinbefore bequeathed, in such manner as she shall think proper during the said twelve calendar months, without being liable to be called to an account for or by reason of any irregularity in the distribution or division of the said interest. (*Add power to trustees to settle daughters' shares,* (38 *h*[4])).

Testator's wife to take the interest on children's legacies until payable, to maintain the children.

38 *h*[4]. Provided always, and I hereby direct and declare, that in case any of my daughters should, after my

Power to trustees to settle the legacies of

(*a*) In the precedent from which this clause was taken, the legacy was given to six of seven children, there being a separate provision for the seventh (a married daughter), and the gift over in this place was thus expressed :—

"Shall go and belong to and be divided equally between or among all my children who shall be living at the time of my decease, [including my said daughter, [*married daughter*], if she should be then living,] and the child or children of any child or children who shall be then dead, such grandchild or grandchildren to take the share or respective shares of his, her, or their deceased parent or parents only; the shares of the said children and grandchildren respectively to be vested and payable or transferable at the like ages or times, and in the like manner in all respects, as his, her, or their original share or shares is or are hereby directed to be vested and to be paid or transferred; And the share of my said daughter, [*married daughter*], to be subject to and held upon the same trusts, and for the same intents and purposes, as are hereinbefore expressed concerning the legacy or sum of £—— hereby bequeathed in trust as aforesaid."

Clause of accruer for the benefit of the other legatees, and also of another person.

daughters marrying under twenty-one.

decease, marry, while she or they respectively shall be under the age of twenty-one years, then, and in every such case, it shall be lawful for my trustees or trustee for the time being, [*or*, the trustees or trustee for the time being of my residuary personal estate,] if they or he should think proper, but not otherwise, to settle the whole or any part of the legacy or legacies, as well original as accruing, hereinbefore bequeathed to such daughter or daughters respectively, [UPON TRUSTS for the benefit of such daughter or daughters respectively, and her or their child or respective children or more remote issue, similar to and corresponding with the trusts hereinbefore declared concerning the legacy of £——, hereby bequeathed in trust for my said daughter, [*married daughter*], and her children and more remote issue, as aforesaid, or] upon such [other] trusts, and subject to such [other] powers and provisions for the benefit of the daughter or daughters respectively so marrying, and her or their husband or husbands, child or children, or more remote issue and next of kin, or any of them, and reserving such powers and authorities to the trustees for the time being of such settlement, in relation to the said legacy or legacies respectively, as my said trustees or trustee shall think proper. (*Or specify the trusts upon which the settlement is to be made.*)

Receipt clause.

38 h^5. AND I FURTHER DECLARE, that the receipt or receipts in writing of the trustees or trustee of every such settlement respectively shall be an effectual discharge or effectual discharges to my said trustees or trustee for the time being, for any sum or sums of money, stocks, funds, or securities, which shall or may be paid or transferred to the trustees or trustee of such settlement respectively; And that the expense of every such settlement shall be paid out of the funds comprised therein (*a*).

Costs of settlement.

As to giving trustees a power of settling legacies of daughters marrying under age.

(*a*) It is often convenient to give trustees a power of settling the legacy of a female marrying during minority, not only as a protection to the legatee against the consequences of an imprudent marriage, but because it may happen, that, otherwise, no effectual settlement can be made. Such is necessarily the case where the intended husband, as well as the wife, is a minor, since neither party can be concluded by any act done whilst in this state of disability. Where the legacy is *reversionary*, the minority of the wife alone will prevent it from being absolutely settled, as the title which would accrue to her by survivorship, in case of the legacy not being reduced into possession during her husband's life, would not be bound by the contract of her husband, though he

38*i*. I GIVE AND BEQUEATH unto each of my five daughters, [*names*], or such of them as shall be living at the time of my decease, the sum of £—— sterling. AND I DIRECT, that my said five daughters shall have vested interests in their respective legacies immediately upon my decease; But the payment thereof shall be postponed until after the decease or marriage as aforesaid of my said wife, and without interest in the meantime. PROVIDED ALWAYS, that, in case any of my five daughters hereinbefore named should happen to marry during the widowhood of my said wife, with the consent and approbation of her or their guardian or guardians for the time being, then it shall be lawful for the trustees or trustee for the time being of my will [*or*, of the trust-fund hereinafter provided for the payment of the said several legacies of £—— each], during the widowhood of my said wife, with her consent and by her direction (testified by writing under her hand), to raise for and pay to each such daughter so marrying as aforesaid one moiety or half part of her said legacy of £——, for her use and benefit. PROVIDED ALSO, and I hereby further declare, that it shall be lawful for the said trustees or trustee for the time being and my said wife, if they should think proper, to settle the said moiety of the legacy or respective legacies, the payment whereof shall be accelerated under this present provision, of any daughter or daughters of mine so as aforesaid marrying during the widowhood of my said wife, UPON TRUST for the benefit of such daughter or daughters, and her or their intended husband or husbands, and the issue of such marriage or marriages, or for the benefit of some one or more of such objects, in such manner in all respects, and with such accompanying powers and provisions as my said wife and trustees (either with or without the concurrence of such marrying daughter or daughters) shall think proper. AND I DIRECT AND DECLARE, that my said trustees or trustee for the time being, upon their paying or transferring to the

Legacies to unmarried daughters to vest immediately, but payable at the death or marriage of the wife.

Power of advancing one-half on marriage.

Power to wife and trustees to settle moiety of legacies of daughters marrying during widowhood of wife.

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were adult, and therefore competent to bind himself, and, by consequence, to make an effectual settlement of such personalty as absolutely accrues to him jure mariti. It is observable, that the incapacity of a woman marrying under age to settle her reversionary equitable choses en action does not terminate with minority, she being, when that incapacity ceases, under the continuing disability of coverture (supposing, of course, the property not to be subject to a trust for separate use, with an unrestricted power of alienation). Hence the importance of giving to trustees a power of settling the reversionary legacy of a female minor on marriage.

trustees or trustee of any settlement or settlements to be made as aforesaid, the moiety so settled of the legacy or legacies of such daughter or respective daughters of mine marrying as aforesaid, shall be exonerated and discharged from all further responsibility in respect thereof.

Legacy of stock to the children of a living person, at twenty-one or marriage.

Substitution of children of deceased children.

38 *k*[1]. I DIRECT my trustees or trustee to purchase, within a year from my decease, or to set apart from such funds as I may be possessed of, the sum of £——, Three per Centum Annuities, and be possessed thereof IN TRUST for such child or children of my sister, [*name*], living at my decease or born afterwards, and such child or children of any child or children of my said sister dead before me, as shall at any time or times, before or after the decease of my said sister, attain the age of twenty-one years [or (being a girl or girls) attain that age] or marry, if more than one in equal shares as between brothers and sisters; But so that the child or the children collectively of any deceased child shall take such share only as his, her, or their parent would have taken if living.

Maintenance of children and grandchildren of a living person who takes no life interest.

38 *k*[2]. I AUTHORISE my trustees or trustee, in their or his discretion, either to apply towards the maintenance and education of each infant son or grandson, and infant and unmarried daughter or granddaughter of my said sister, or, during the life of my said sister, to pay to her for that purpose, all or a competent part of the income from such child or grandchild's presumptive portion (*a*); And to invest and add to the capital of such portion the surplus income therefrom; With power so to apply or pay such accumulations towards or for the maintenance or education of the person or persons presumptively entitled thereto; And such income and accumulations to be so applicable or payable by my said trustees or trustee without their or his being bound to inquire whether such maintenance or education ought to be provided from any other source, and without responsibility for the application of any monies which shall be so paid to my said sister; AND, at their or his discretion, to apply for the benefit of any infant son or grandson, or infant and unmarried daughter or granddaughter, or to pay to any other child or grandchild, not more than one-third of his or her presumptive portion.

Advancement.

Adults to receive income from their pre-

38 *k*[3]. AND I DIRECT my said trustees or trustee to pay to each adult son or grandson, and to each adult or

(*a*) [The peculiarity in this case is, that a life interest is not given to the parent, so that there may be a fund applicable for maintenance before the minimum amount of each share is ascertained.]

married daughter or granddaughter, the income from his or her presumptive share for the time being (*a*). AND I AUTHORISE my trustees or trustee, if they or he should think fit, to distribute the said sum of £—— in the lifetime of my said sister, at any time after she shall have attained the age of fifty years.

sumptive shares.

Authority to divide the funds when mother shall have attained a certain age.

38 *l*[1]. I GIVE to each of my daughters who shall marry, the sum of £7000; AND I DIRECT that the same shall vest in and be paid to her upon her marriage; And, if any of my said daughters should attain the age of twenty-one years, and die without having been married, I DECLARE that it shall be lawful for each such daughter, by any will, codicil, or testamentary writing, to bequeath £1000 (part of the sum of £7000 so intended for her) to such person or persons, and for such purposes [(other than charitable or religious purposes)], as she shall think proper; And, if any of my daughters should depart this life before me, or without having been married, I DIRECT that the sum of £7000, to which each such daughter so dying would have been entitled if she had survived me and been married (*b*), (but deducting out of the same the sum of £1000, if she shall have made an effectual bequest thereof in exercise of the power given to her for that purpose, or so much of such sum of £1000 as she shall have so effectually disposed of), shall be paid to such of my other daughters as shall survive me and marry, to be divided between or among them, if more than one, in equal shares, so far as to make the legacy or portion of each of my said daughters who shall survive me and marry, amount to the sum of £10,000, and not further; And any surplus shall sink into the residue of my estate. AND I DIRECT that the said contingent legacies or portions to my said daughters shall carry interest, payable quarterly, from the time of my decease; And while any of my daughters shall be under the age of twenty-one years and unmarried, an adequate part

Legacies to daughters on marriage.

Power to daughters dying unmarried to bequeath £——.

Accruer.

Interest on contingent legacies.

Maintenance.

(*a*) [If a child were born in the interval between two days of payment, this would be a determination pro tanto of the interest of any adult child or children in the income here directed to be paid, and the Apportionment Act, 6 & 7 Will. 4, c. 22, s. 2, would therefore apply.]

Apportionment of income.

(*b*) [In the original precedent, the gift over was extended to accrued shares, but as the only persons to take under the clause of accruer were expressed to be married daughters, this was inaccurate; and the clause was defective in not providing for lapse by death in the testator's lifetime.]

As to clause of accruer.

of the interest on her presumptive legacy shall be paid and applied by my said trustees or trustee for the time being for her maintenance and education, and the residue thereof shall be accumulated, and the accumulations thereof shall, if required, be applicable for her maintenance and education, and if not wholly applied for that purpose, the said accumulations, or the unapplied portion thereof, shall become an interest vested in and be paid to her if and so soon as she shall attain the age of twenty-one years, or on her marriage, which shall first happen, and if she should die under the age of twenty-one years and unmarried, such accumulations or the unapplied part thereof shall go over and be paid to such of my other daughters, if any, as shall survive her and shall attain the age of twenty-one years or marry, and shall not be considered as an addition to the capital of their respective legacies or portions within the meaning of the provision hereinbefore contained for limiting the amount thereof to £10,000; And if such daughter should attain the age of twenty-one years without having been married, the whole accruing interest of her then presumptive legacy or portion shall, from that time until she shall marry or depart this life, be paid to or for her own proper use and benefit.

Substitution of smaller legacy and annuity for any daughter who shall become a nun.

38 *l*[2]. Provided always, that, if any of my said daughters, before she shall have been married, shall profess herself a nun in any religious community in England or abroad, or make any vow or enter into any engagement of that nature, the bequest to her of the aforesaid sum of £7000 or £10,000, as the event may be, and of the interest thereof, and the power given her to dispose of the sum of £1000, shall thereupon become absolutely void; And, in lieu thereof, I bequeath to her the sum of £1400, to be paid to her upon her profession. And in such event I also give and bequeath to her an annual sum of £50, to be paid to her during her life, until she shall commit or suffer some act or default which (but for this limitation) would have the effect of giving the benefit of the said annuity either wholly or partially to some other person or persons; And the first quarterly payment thereof to be made to her at the expiration of three calendar months next after her profession; And I charge my estate at —— with the payment thereof; And the surplus which shall remain of the legacy or portion intended for her, after the payment of the said sum of £1400, shall survive or accrue to, between, or among such of her said sisters as shall survive me and marry,

subject to the restriction hereinbefore mentioned, in the same manner as if she were then actually dead and unmarried.

Legacy to trustees for two equally. (Variation where the gift is of savings of pin money, &c.)

39 *a*[1]. I GIVE AND BEQUEATH the sum of £—— [*or*, all such savings and arrears of my pin-money and other separate income as may be in the hands of or owing from my husband or any trustee for me at my decease,] unto the said [*trustees*], their executors, administrators, and assigns, IN TRUST for my two nieces, [*names*], in equal shares absolutely; And if either or both of them should die before me, then the share intended for each niece so dying shall be in trust for such her child or children as shall attain the age of twenty-one years, or (being a daughter or daughters) attain that age or marry under that age, and, if more than one, in equal shares and proportions; and if there be no such child, then upon the trusts herein declared concerning the other moiety of the said trust-monies.

Substitution of children in case of death.

Investment.

39 *a*[2]. AND I DIRECT the said [*trustees*], or the survivor of them, his executors or administrators, or their or his assigns [*or*, my said trustees or trustee for the time being], to invest the said trust-monies or such part thereof (if any) as shall not be payable at my decease, in their or his names, in the funds or on mortgage, until the same be payable, (with power from time to time to vary such investments); And to apply the income therefrom towards the maintenance and education of the person or persons for the time being presumptively entitled to the capital producing such income; and to accumulate any surplus income as capital, but with power to resort thereto for maintenance; And with power to apply not more than one-half of each legatee's presumptive share for his or her advancement in life.

Power to vary investments.

Maintenance.

Advancement.

Pecuniary legacies to younger sons.

39 *b*. AND I GIVE to each of my sons, other than and except such one of my said sons (if any), as, at the time of my decease, shall be entitled, under the limitations aforesaid, to an estate for life in possession in the real estates respectively hereinbefore [*or*, hereinafter] devised and appointed, the sum of £——, the same to be a vested interest in each such son immediately on my decease, but not to be payable until the expiration of eighteen calendar months after my decease; Nevertheless, I DECLARE, that each of the said legacies shall carry interest at the rate aforesaid from the time of my decease, to be payable quarterly.

Interest.

Portions to

39 *c*. I GIVE to each of my children now living, or to be

children, to vest immediately, payable at twenty-one or marriage; maintenance, &c.

Child succeeding to realty not to take legacy.

hereafter born, the sum of £——, to be a vested interest immediately, and to be payable as soon as such child shall attain the age of twenty-one or marry; with interest thereon in the meantime from the day of my death, at the rate of £4 per centum per annum, for maintenance; But any child who shall become entitled under this will to the possession of all or any part of my residuary real estate before his or her majority or marriage, shall cease to be entitled to such legacy and interest.

Legacy to each of the children of A. B., to vest at twenty-one or marriage.

39 *d.* I give to each child of [*name*], born or to be born in my lifetime [*or*, at any time or times during his life], who shall attain the age of twenty-one years or [(being a daughter) attain that age or] marry, the sum of £——, with interest thereon at five per cent. from the expiration of one year from my decease, [or from the birth of such child, whichever shall last happen], until the majority, marriage, [(in case of a daughter)], or death of such child, to be applied by my trustees or trustee, or paid to such child's guardian, for his or her maintenance and education. Provided (*a*) that such legacy shall not vest as a transmissible interest in such child before his or her majority or [(in case of a daughter), majority or] marriage.

Vesting.

Legacies to nephew and niece to be paid at twenty-one or marriage, with cross limitations and gift over.

39 *e.* I give to my nephew [*name*], if he attain his majority, the sum of £——. I give to my niece [*name*], £——, if she attain her majority or marry. And, if either my said nephew should die before me or under age, or my said niece should die before me or under age and unmarried, I give the legacy intended for such nephew or niece so dying to the other of them, if he or she attain his or her majority, or (as to my said niece) if she marry; And, if both should die before me or under age and (as to my said niece) unmarried, I give their respective legacies to my cousin, [*name*].

Trusts for investment, maintenance, and advancement.

I direct my trustees or trustee to invest the said two presumptive legacies of £—— upon Government, parliamentary, or real security in England or Wales, until the same shall be payable; And to apply the income from each legatee's legacy towards his or her maintenance and edu-

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(*a*) [This proviso is, perhaps, a superfluous addition to a gift worded as in the text, but very clear expressions are requisite to control the presumption of immediate vesting which arises from the gift of interest: *Leake* v. *Robinson*, 2 Meriv. 386; *Murkin* v. *Phillipson*, 3 Myl. & K. 257; *Watson* v. *Hayes*, 5 Myl. & Cr. 125.]

cation; With power to apply not more than one-half of the capital thereof for his or her advancement in life.

Legacy to the six children of A. B. Substitution of children and widow or widower of any deceased child. Widow or widower to take one-half share.

39 *f*. I GIVE the sum of £—— to or among such of the six children of my late cousin [*name*] as shall survive me (*a*), and such child or children and widow or widows or widower or widowers of any other or others of them as shall survive me, if more than one, as tenants in common; But so that the share of the widow or widower of any such deceased child shall be one-half of the share taken by any such surviving child (*b*), or by the child or children alone, or by the child or children and widow or widower, (as the case may be), of any deceased child, and the share of the child or children of any deceased child, together with the share of the widow or widower of such deceased child (if any), shall be equal to the share which such deceased child would have taken if living. [*Or*, BUT so that such widow or widower and child or children, or widow or widower alone, or child or children alone (as the case may be), of any deceased child shall take such share only as such deceased child would have taken if living; And when both a widow or widower and a child or children of deceased child shall survive me, such widow or widower shall take one moiety of the share which such deceased child would have taken if living.]

Legacies to daughters, to be paid notwithstanding minority.

40 *a*. I GIVE the sum of £100 to each of my daughters, to be paid to her upon her own receipt for the same immediately upon my decease, and whether she shall then have attained the age of twenty-one years or not.

Legacies to nephews and nieces, as to the latter for separate use.

40 *b*. I GIVE AND BEQUEATH unto each and every of my nephews and nieces who shall be living at the time of my decease the sum of £——; And I direct that the legacies to such

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(*a*) [A gift to "the six children of A.," as tenants in common, not being a gift to a class, would be liable to lapse as to the share of any legatee dying before the testator. But a gift under the same circumstances to "the child or children of A.," as tenants in common, would wholly vest in those who survived the testator, vide ante, p. 318.]

(*b*) [To say that the widow or widower of a deceased child shall take one-half of the share which such child would have taken if living, would not express the intention in the case of a child leaving a widow or widower and no issue. For, suppose five of the children to survive, and one to have died leaving a widow but no child, then the intention is, that the widow should take half as much as each of the survivors, or one-eleventh of the entire legacy. But one-half of the share which the deceased child would have taken if living would be one-twelfth.]

of my nieces as shall then happen to be under coverture shall be paid to them for their separate use, independently of their husbands; [and the receipts of such nieces respectively alone shall be an effectual discharge to my executors for the said legacies].

Legacies to nephews who attain twenty-one or leave issue.

Investment.

40 *c*. I GIVE to each of my nephews, [*names*], who shall attain the age of twenty-one years, or die under that age leaving issue, the sum of £——. The respective amounts of their said expectant legacies, in the meantime, to be placed out at interest by my executors for the benefit of my said nephews respectively during their respective minorities, and the interest to be accumulated and added to the principal, and to follow the destination thereof, or [with or without the principal or any part thereof] to be applied in and towards their respective maintenance and benefit as my executors in their discretion shall think most proper; And any unapplied capital, income, and accumulations of the presumptive legacy or legacies of such of my said nephews as shall die under the age of twenty-one years without leaving issue to sink into my residuary personal estate.

Maintenance out of income [or principal].

Legacies to children of brother, with power to apply or pay the same to the father or mother, for the benefit of any infant legatee.

40 *d*. I GIVE to each of the children of my brother, [*name*], born or to be born at any time or times before or after my decease, the sum of £——. AND I AUTHORISE, but do not require, my trustees or trustee for the time being, at any time or times, to pay the legacy or legacies of such of my said brother's children as may be under age and unmarried, or any part or parts thereof, to my said brother, or (if he be dead) to such child or children's mother, to be by him or her applied for the benefit of such child or children. AND I DECLARE, that the receipt in writing of such parent for the money so paid to him or her shall discharge my said trustees or trustee from seeing to the application thereof; And, if there be no such parent living, I AUTHORISE my trustees or trustee, in their or his discretion, to apply the legacy of each infant and unmarried child, or any part thereof, for the benefit of such child.

Legacies to several infants to vest at twenty-one or marriage.

Investment of legacies.

40 e^1. I GIVE AND BEQUEATH unto each of my nephews and nieces, [*names*], who shall attain the age of twenty-one years, or [as to nieces] marry under that age, the sum of £——.

40 e^2. AND I DIRECT my said trustees or trustee for the time being to invest the presumptive legacy of each of my said nephews and nieces who at the time of my decease shall be under the age of twenty-one years and [being a niece] unmarried, in the names or name of my said trustees or trustee, in

the public stocks or funds of Great Britain, or upon real security in England or Wales, with power from time to time to vary such investments. AND I AUTHORISE AND EMPOWER my said trustees or trustee, in their or his discretion, from time to time to apply all or any part or parts of the annual produce and income or of the capital of the presumptive legacies or legacy of each or any of my said nephews and nieces in or towards his, her, or their maintenance and education, or in any manner for his, her, or their advancement, benefit, or advantage; And to invest and accumulate any surplus income, and add the same to the capital from which it shall have arisen; With power to apply such accumulations in manner aforesaid. AND in case any of my said nephews and nieces should die under the age of twenty-one years and [being a niece or nieces (*a*)] unmarried, I DIRECT that the legacy intended for him, her, or them, and the accumulations of the income thereof, shall sink into the residue of my personal estate [*or*, shall be paid to and equally divided among such of my said nephews and nieces as shall attain the age of twenty-one years, or [being a niece or nieces] marry under that age.]

Maintenance and advancement.

40*f*. I GIVE AND BEQUEATH the sum of £—— unto such of the following persons, [*names*], as shall be living at my decease [and shall attain the age of twenty-one years, or die under that age leaving issue], and the children then living and who shall attain the age of twenty-one years, or die under that age leaving issue (*b*), of such of the last-named persons as shall die before me, in equal shares; But so that the child or the children collectively of one parent shall take one share only, to be divided equally among them. (*Add proviso for investment, maintenance, and advancement*, (40 *h*)).

Legacy among several persons by name at twenty-one or marriage, with substitution of children.

40*g*. I GIVE AND BEQUEATH the sum of £—— unto such of the following persons, [*living persons*], as shall be living at my decease [and shall attain the age of twenty-one years, or die under that age leaving issue], and the child or children then living and who shall attain the age of twenty-one years, or die under that age leaving issue, of such of the last-mentioned persons as shall die before me, and of [*deceased persons*], respectively deceased, in equal shares; But so that the child or

Legacy among several persons by name, and the children of deceased persons per stirpes, at twenty-one. Substitution of children.

(*a*) [If the legacies of nephews are not to vest on marriage there should be a clause substituting their children, as in (38 *h*²) or (40 *i*²).]

(*b*) [This seems to be better than allowing the legatee to take a vested interest on marriage merely. If the legatees are adult, the words in crotchets will be omitted.]

the children collectively of one parent shall take one share only, to be divided equally among them. (*Add proviso for investment, &c.*, (40 *h*)).

Investment of legacies; maintenance and advancement.

40 *h*. I DIRECT my said trustees or trustee for the time being to invest in the funds or on mortgage the presumptive legacy or share of any of the said legatees who shall be under age and unmarried, with power to vary such investments, And, in their or his discretion, to apply the whole or part of the income therefrom towards the maintenance and education of such legatees or legatee, And to accumulate any surplus; Such accumulations to be applicable for future maintenance and education, and, subject thereto, to be added to the principal, and to follow the destination thereof. And I AUTHORISE my said trustees or trustee, in their or his discretion, to apply not more than one-half of the presumptive legacy or share of any minor for his or her advancement or benefit in any way.

Legacy among several persons by name, and the children of deceased persons per stirpes.

40 *i*[1]. I GIVE AND BEQUEATH the sum of £—— unto such of the following persons, [*names*], as shall attain the age of twenty-one years, or die under that age leaving a surviving husband or wife or issue, [and the child or children who shall attain the age of twenty-one years, or die under that age leaving a surviving husband or wife or issue, of [*deceased persons*], respectively deceased], in equal shares; [BUT so that the child or the children collectively of one parent shall take one share only, to be divided equally among them].

Substitution of personal representatives of legatee dying before testator, and leaving a widow, husband, or child.

40 *i*[2]. AND in case any of the said intended legatees should die before me, leaving a husband or wife or issue living at my decease, I GIVE the share which each such legatee would have taken, if he or she had survived me, unto his or her executors or administrators, as part of his or her general personal estate. (*Add proviso for investment, &c.*, (40 *h*)).

Legacies to nephews at twenty-one.

Substitution of children of deceased nephews.

40 *k*. I GIVE £—— to each of my four nephews, [*names*], (children of my late brother, [*name*],) who shall survive me, and attain the age of twenty-one years. I GIVE the like sum to or equally among the child or children who shall attain the age of twenty-one years or die under that age leaving issue of each of my said nephews who shall die before me, or under the age of twenty-one years. I GIVE £—— to each of my three nieces, [*names*], (children of my said late brother), who shall survive me and attain the age of twenty-one years, or marry under that age. I GIVE the like sum to, or equally among, the child or children who shall attain the age of twenty-one years, or die under that age leaving issue, of each of my said nieces who shall die before me. AND I

Legacies to nieces at twenty-one or marriage.

Substitution of children of deceased niece.

Gift of legacies

GIVE such of the said legacies intended for my said nephews and nieces respectively, or their issue, as shall not take effect under the bequest hereinbefore contained, unto and among such of my said nephews and nieces, and their issue, as shall take vested interests or a vested interest under the said bequest; and if more than one, to be divided between or among them, in proportion to the respective amounts of their respective original legacies under the said bequest hereinbefore contained. (*Add provision for investment, &c.*, (40 *h*)).

intended for nephews or nieces dying before testator, or under age and without issue, to the other legatees rateably.

40 *l.* I GIVE AND BEQUEATH the sum of £——, Unto such child or children of my deceased ~~sister~~ daughter, [*name*], late the wife of [*son-in-law*], at such respective ages, and in such manner in all respects as the said [*son-in-law*] shall by any deed or deeds or by will appoint, or, without making any appointment, shall divide, pay, or apply the same; and, subject to any such appointment, Unto and equally among such of the said children as shall attain the age of twenty-one years, or marry under that age: PROVIDED, that no such child shall take under the limitation or gift in default of or subject to any exercise of the power, hereby given to the said [*son-in-law*], without giving up or allowing in account the value or amount of any share or shares which may have been appointed to him or her under such power [*or*, Unto and equally among such of the children of my deceased daughter, [*name*], late the wife of [*son-in-law*], as shall attain the age of twenty-one years, or marry under that age]. I DIRECT that the said legacy of £——, with interest thereon from the day of my decease, shall, as soon as conveniently may be after my decease, be paid to or retained by the said [*son-in-law*], whose receipt in writing shall effectually discharge his co-executors or co-trustees from the same. AND I AUTHORISE AND EMPOWER the said [*son-in-law*] to invest the said legacy or sum of £——, or so much thereof as for the time being shall not be payable to the said legatees respectively, or shall not have been by him applied for their benefit under the power hereby given to him, in the public stocks or funds, or on mortgage of property of any description or of any legal or equitable interest in property of any description, or in the purchase of shares in any joint stock company, or in or upon such other investment or security, whether real or personal, as the said [*son-in-law*] shall think fit, with power for the said [*son-in-law*], from time to time, to vary any such investments. AND I FURTHER AUTHORISE AND EMPOWER the said [*son-in-law*], during the minority or re-

Legacy to children of deceased daughter, to be paid to their father, with full discretionary power to deal with it as he thinks fit;

—power to invest legacy on any security.

spective minorities of any of the said children, in his absolute discretion, to apply in any manner, for the maintenance, education, or benefit of any such minor or minors, or any of them, all or any part of the principal or income of the said legacy or sum of £——; [*or, if he has no power of appointment,* of his, her, or their expectant or presumptive share or respective shares of the said legacy or sum of £——(*a*).]

(*Trusts of residue.*) Annuity to sister for her separate and inalienable use;

41. I DIRECT my trustees or trustee, out of the income from the said trust-funds, to pay an annuity of £——, (clear of legacy duty and all other deductions), to my sister, [*name*], during her life, for her separate and inalienable use, by quarterly payments, on such quarter-days as shall be most convenient with regard to the investment of the said trust-funds, the first payment to be made within three calendar months from my decease, and to be proportional to the time which shall then have elapsed, and a proportional part to be paid to her executors or administrators for any fraction of a quarter immediately preceding her decease; and, subject thereto, to pay the sum of £—— to each child of my said sister, [*name*], who shall attain the age of twenty-one years or marry, and to such child or children of each child of my said sister, dead at my decease, as shall survive me and attain the age of twenty-one years or marry, if more than one, in equal shares, With power to apply the income from the presumptive share of any minor, or any accumulations of such income, towards such minor's maintenance and education; And, with the consent, in writing, of my said sister, or, after her decease, at the discretion of my said trustees or trustee, to apply not more than half of any minor's presumptive share for his or her advancement or benefit.

—legacies to sister's children or their issue;

—maintenance;

—advancement.

Appointment of portions under power in settlement.

42. IN PURSUANCE of the powers contained in my marriage settlement, I DIRECT the annual sum of £—— to be raised and paid to my wife, during her life, for her separate and inalienable use. AND I APPOINT to each of my sons, being an object of the power in that behalf contained in my marriage

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(*a*) [The object is to give the benefit of the legacy as far as possible to the father without rendering it liable to the £10 per cent. legacy-duty. A declaration that he shall not be accountable for maintenance out of his own property might possibly be thought to render the bequest liable as a legacy to him.]

settlement, who shall attain the age of twenty-one years or marry, the sum of £——; And, by virtue of the same power, I APPOINT to each of my daughters who shall attain the age of twenty-one years or marry, the sum of £——. I DECLARE, that the sum of £——, which I have expended in the purchase of a commission in the army for my son, [*name*], is to be considered as a satisfaction to that extent of the portion hereby appointed to him (*a*); AND that the sum of £——, which I settled upon the marriage of my daughter, [*name*], is to be considered as a satisfaction to that extent of the portion hereby appointed to her. AND, if any of my daughters should be married at the time of my decease, I DIRECT that the portion of each such daughter shall be held by the trustees or trustee of my marriage settlement, IN TRUST, [with the consent of such daughter, or, after her decease, at their or his discretion, to invest the same in the public stocks or funds or on real securities in England or Wales, (and not in Ireland), with power, from time to time, with such consent or at such discretion, to vary such investment, and to pay the income from such portion to such daughter], for her separate and inalienable use [during her life; AND, after her decease, to transfer such portion in such manner as she shall, notwithstanding coverture, by will appoint; AND, subject thereto, to hold the same, if she should survive her husband, IN TRUST for her absolutely, and, if she should die in her husband's lifetime, as if the same were her personal estate, and she had died without leaving a husband.] I DECLARE, that any advancements which I have made or may make for the benefit of any of my children, to a greater amount at any one time than £——, shall be taken in satisfaction, to that extent, of the portions hereby appointed to him, her, or them; AND I DECLARE, that all such advancements as aforesaid, already made or to be made, shall be deemed to have been made in exoneration of the estates comprised in my marriage settlement, and which I have power to charge with portions.

Advancements in testator's lifetime to be considered as in satisfaction.

Portions of married daughters to be for their separate use.

Advancements to be in exoneration of estates charged.

43 *a*[1]. I GIVE AND BEQUEATH unto the said [*trustees*] the sum of £—— sterling, to be paid to them within twelve

Legacy to trustees;

(*a*) [The settlement is supposed to contain a power of *charging* portions to a limited amount on the real estate,—not a mere power of selection among children to whom an ascertained fund is given equally in default of appointment.]

calendar months next after my decease, with interest thereon at the rate of £4 per centum per annum from the day of my decease, and clear of legacy duty and all other deductions,

—trust for investment of legacy;

43 a^2. Upon trust to lay out and invest the same in the names or name of the said [*trustees*] or the survivors or survivor of them or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, in the public stocks or funds of Great Britain, or, [during the life of my daughter [*name*], the wife of [*name*], with her consent in writing, and after the decease of my said daughter, at the sole discretion of my said trustees or trustee for the time being], upon mortgage of any land, tenements, or hereditaments in England or Wales, and not in Ireland, of freehold, copyhold, or customary tenure, or held on lease or leases for years or lives or years renewable for ever, or for any term or terms of years whereof not less than sixty years shall be unexpired, [or in Bank stock, or upon debentures or mortgages of any such canal, railway, or dock company or companies, or other similar company or companies, in Great Britain, as my said trustees or trustee for the time being shall consider well established and sound, or in the paid up shares or joint stock of any such company or companies paying a dividend.]

—power to invest on mortgage [with consent];

—power to invest in railway stock, &c.;

—power to appropriate securities left by testator;

43 a^3. [With power for my said trustees or trustee for the time being to appropriate for the purpose any of such stocks, funds, securities, [shares,] or investments, of any such kind or kinds as aforesaid, as I shall be possessed of at the time of my decease, at the market value or amount thereof at the time of such appropriation; in which case the annual produce and income of such appropriated stocks, funds, securities, [shares,] or investments, which shall accrue from and after my decease, shall be taken and be in lieu and satisfaction of and for the interest hereinbefore given from the day of my decease on the amount of the said legacy or sum of £——, or on such part thereof as shall be satisfied by such appropriation; And also]

—power to vary investments;

43 a^4. With power for my said trustees or trustee for the time being, from time to time, [during the life of my said daughter, with her consent in writing, and after her decease, at the sole discretion of my said trustees or trustee for the time being,] to change or vary all or any of such investments or securities. And I direct that the interest on the said legacy or sum of £——, which shall become due thereon from my estate before the investment thereof, shall be held and ap-

plied upon and for the same trusts and purposes as are hereinafter expressed concerning the annual produce and income of the stocks, funds, and securities in or upon which the same legacy or sum of £—— is hereinbefore directed to be invested. AND I DIRECT AND DECLARE that my said trustees or trustee for the time being shall stand and be possessed of and interested in the said trust-monies, and the stocks, funds, and securities in or upon which the same shall or may for the time being be invested,

43 *a*[5]. UPON TRUST, from time to time, to pay the annual produce and income arising therefrom into the proper hands of my said daughter [*name*] for and during her life, so that the same may be for her sole and separate use and benefit, free from the control, debts, and engagements of her said husband or of any future husband, and so that my said daughter may not have power to alienate, dispose of, engage, or receive the same or any part thereof by way of anticipation; And, from and after the deccase of my said daughter, —trust for separate and inalienable use of married daughter for life;

43 *a*[6]. UPON TRUST, in case my said daughter, [*name*], whether married or sole, should by her last will and testament or any testamentary writing so direct, to pay unto any surviving husband of my said daughter, for his own use and benefit, during his life or for any shorter time to be so appointed by my said daughter, any part not exceeding one-half of the annual produce and income of the said trust-monies, stocks, funds, and securities; And, subject to any such payment to be so directed or appointed as aforesaid, —power for daughter to appoint life interest in a moiety to husband;

43 *a*[7]. UPON TRUST to pay or transfer the said trust monies, or the stocks, funds, or securities in or upon which the same shall for the time being be invested, Unto or among such one or more of the children, or more remote issue, of my said daughter, [*name*], (whether the parent or ancestor of such issue shall be living or dead (*a*), but such issue being born in the lifetime of my said daughter), and at such time or times, and, if more than one, in such shares and proportions, and subject to such conditions, restrictions, and limitations, for the benefit of some or one of the said children or issue, as my said daughter [*name*] shall, whether covert or sole, by any deed or deeds, with or without power of revocation or new appoint- —trusts for daughter's issue, as she shall appoint;

(*a*) [It seems in general to be better not to confine these powers to the issue of *deceased* children, as cases may often occur in which it would be advisable to appoint to the issue of a living child.] Power to appoint to issue of living children.

ment, or by her last will and testament or any testamentary writing, direct or appoint. PROVIDED, NEVERTHELESS, that no child or other issue of my said daughter, [*name*], shall take a vested or absolute interest under any such direction or appointment as aforesaid, until such child or issue shall attain the age of twenty-one years, or (being a girl) shall attain that age, or be married (*a*); And in default of any such direction or appointment, or as to so much of the said trust-monies, stocks, funds, and securities, or such interest therein, as shall not be effectually disposed of by any such direction or appointment,

—appointee not to take a vested interest while under age and discovert;

43 *a*[8]. UPON TRUST for such child or children of my said daughter [*name*] as shall live to attain the age of twenty-one years, or (being a daughter or daughters) shall live to attain that age or be married, and also such child or children of any son of my said daughter who shall die under the age of twenty-one years, as shall live to attain the age of twenty-one years, or (being a daughter or daughters) shall live to attain that age or be married, and if more than one, to be divided between or among them in equal shares and proportions, as between brothers and sisters, but so that the child or the children collectively of any deceased son of my said daughter shall take only the share which such son would have taken if living, and if more than one, in equal shares and proportions.

—in default of appointment, for her son at twenty-one or daughters at twenty-one or marriage. Substitution of children of sons dying under twenty-one;

43 *a*[9]. PROVIDED ALWAYS, AND I HEREBY DIRECT, that no child or grandchild of my said daughter, [*name*], who shall take any share or shares of the said trust-monies, stocks, funds, and securities by virtue of any appointment to be made by my said daughter under the power hereinbefore contained shall, without an express direction to that effect in such appointment to be contained, be entitled to any share of the unappointed part of the said trust-monies, stocks, funds, and

—hotchpot clause;

As to restriction on appointments to infants.

(*a*) The design of this clause, it will be observed, is to prevent the abuse of the power sometimes practised in making an absolute appointment to a child at a very early age and in precarious health, in order that at the death of the child the appointed fund may devolve to the parent, who, on taking out administration, would become entitled to the personal property of such deceased. The remark equally applies to more remote issue, to whom, therefore, the condition is properly, though less frequently extended. [The same object is sometimes attained by restraining the exercise of the power to objects who shall survive the appointor, as in (42 *c*[2]), infra; but, in general, it is not desirable to disable the tenant for life from making an immediate appointment to an adult child.]

securities under the limitations or trusts in default of appointment hereinbefore contained, unless such child or grandchild shall bring the share or shares appointed to him or her into equal distribution with the unappointed part or share of the said trust-monies, stocks, funds, and securities, under the said limitations or trusts in default of appointment, between or among him or her and the other child or children and grandchild or grandchildren (if any) who shall be entitled to participate in such unappropriated part under the said limitations or trusts in default of appointment and this proviso.

—in default of issue to take under foregoing trusts,

43 a^{10}. And in case there should be no child or grandchild of my said daughter, [*name*], who shall live to attain the age of twenty-one years, or (being a daughter or granddaughter) shall live to attain that age or be married, then (subject to any such appointment as aforesaid),

power for daughter to appoint generally by will, or, while discovert, by deed;

43 a^{11}. Upon trust to pay or transfer or dispose of the said trust-monies, stocks, funds, or securities, and the annual produce and income thereof, unto or for the benefit of such person or persons, upon such trusts, for such ends, intents, and purposes, and in such manner and form as my said daughter, [*name*], shall, while discovert, by any deed or deeds, or shall whether covert or sole, by her last will and testament or any testamentary writing, direct or appoint. And in default of any such direction or appointment, and as to so much of the said trust-monies, stocks, funds, and securities and such interest therein as shall not be effectually disposed of by any such direction or appointment, Upon trust for such person or persons as, under the statutes for the distribution of the personal estates of intestates, would be entitled to the same trust-monies, stocks, funds, and securities, in case my said daughter, [*name*], had died absolutely entitled thereto as part of her personal estate and intestate, and without leaving a husband [*or*, Upon trust for my said daughter, her executors and administrators.]

in default of appointment for daughter's next of kin,

—maintenance of infant children and grandchildren of legatee for life, with or without a power of appointment;

43 a^{12}. Provided always, and I hereby direct, that my said trustees or trustee for the time being shall, after the decease of my said daughter, and while any child or other issue of my said daughter, who for the time being shall be presumptively or actually entitled, [either by virtue of any appointment or in default of appointment,] to all or any part or share of the said trust-monies, stocks, funds, and securities, shall be under the age of twenty-one years, and (being a girl or girls) unmarried, [(but subject always to

the interest of any surviving husband of my said daughter under any direction or appointment to be so made in his favour as aforesaid),] pay and apply the whole or such part, as they or he my said trustees or trustee for the time being shall think fit, of the annual produce and income of the fund, part, or share to which such child or other issue of my said daughter shall for the time being be presumptively or actually entitled, for or towards the maintenance and education of such child or issue; And that my said trustees or trustee for the time being may, if they or he shall think fit, pay the same for that purpose to the surviving parent or guardian or guardians of such child or issue, [or to any person or persons who, whether duly appointed or authorised or not, shall act as guardian or guardians of such child or issue,] without being bound to see to the application thereof; And shall, during such minority or such minority and discoverture (as the case may be), accumulate all the surplus (if any) of the said annual produce and income in the way of compound interest, by investing the same, and all the resulting produce and income thereof, from time to time in or upon any of the stocks, funds, securities, or investments hereinbefore authorised, and add such accumulations to the principal or capital of the fund or share from which the same shall have arisen; With power, nevertheless, for my said trustees or trustee at any time or times to resort to any such accumulations for the maintenance or education of the person or persons for the time being presumptively or actually entitled thereto.

—power to pay maintenance-money to guardians;

—accumulation of surplus income;

43*a*[13]. PROVIDED ALSO, AND I HEREBY DECLARE, that it shall be lawful for my said trustees or trustee for the time being, at any time or times in the lifetime of my said daughter [*name*], with her consent in writing, and after her decease [with the consent in writing of her surviving husband (if any), and after the decease of my said daughter and the decease of her surviving husband (if any)] at the sole discretion of my said trustees or trustee for the time being, to raise any part or parts not exceeding in the whole one-half of the fund or share to which any child or issue of my said daughter shall be presumptively or actually entitled, [either by virtue of any appointment or in default of appointment, (but as to any appointed share subject to any direction to the contrary or restriction to be contained in the appointment thereof),] and to pay or apply the same for the advancement in the world or benefit of such child or issue, in such manner as my said trustees or trustee shall think fit.

—power to advance portions.

43 b^1. And I give and bequeath unto the said [*trustees*] the sum of £—— sterling, to be paid to them at the expiration of twelve calendar months next after my decease, but without interest in the meantime, upon the following trusts, (that is to say), —Legacy to trustees;

43 b^2. Upon trust that the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, will or shall lay out and invest the same in the names or name of my said trustees or trustee for the time being, in the public stocks or funds of Great Britain, or on real security in England or Wales (and not in Ireland), With power for my said trustees or trustee for the time being to vary such investments or securities, as often as it shall be deemed expedient so to do; And that my said trustees or trustee for the time being will be possessed of the said legacy or sum of £——, and the stocks, funds, and securities upon which the same shall be invested, (*Trust for separate and inalienable use of daughter for life* (43 a^5), *after her death for her issue as she shall appoint* (43 a^7), *and in default of appointment for her children equally* (43 a^8); *hotchpot clause* (43 a^9); *maintenance* (43 b^3); *on failure of trusts legacy to sink into residue* (43 b^4). —trust for investment of legacy; —power to vary investments; —trusts for daughter for life, and then for her children;

43 b^3. And in case there should be at the time of the decease of my said daughter any child or children or other issue of such daughter, whose share or respective shares of and in the said trust-monies, stocks, funds, and securities shall not then be vested in him, her, or them respectively, Upon trust that the said trustees or trustee for the time being will and shall in the meantime, from and after the decease of my said daughter, (subject to any contrary direction or regulation to be contained in any such appointment by my said daughter as aforesaid), pay and apply the annual produce and income of the expectant or presumptive share of every such child or other issue of and in the said trust-monies, stocks, funds, and securities for or towards his or her maintenance and education, until the share of such child or other issue shall become vested or he or she shall previously die. —maintenance;

43 b^4. But in case there should be no child of my said daughter, [*married daughter*], who (being a son) shall live to attain the age of twenty-one years, or (being a daughter) shall live to attain that age or be married, then (subject to any such appointment as aforesaid), Upon trust to pay, apply, and transfer the said trust-monies, stocks, funds, and securities in —if no issue acquires a vested interest, the money to sink into the residue.

such manner and to and for such trusts, intents, and purposes as are herein mentioned and declared with respect to the residue of my personal estate.

Bequest of £—— to trustees, upon trust to invest;

43 *c*[1]. I GIVE AND BEQUEATH unto the said [*trustees*], their executors, administrators, and assigns, the sum of £——, to be appropriated at the end of six calendar months after my decease, with interest from the day of my decease, UPON TRUST to invest the same in their names in the public stocks or funds of Great Britain, or at interest upon real security in England or Wales, (such investments to be from time to time altered and varied as my trustees or trustee for the time being shall think fit, yet so that during the life of my said wife every such investment and alteration be made with her consent in writing). AND my will is, that the said [*trustees*], their executors, administrators, and assigns, shall stand and be possessed of and interested in the said sum of £—— so bequeathed to them as aforesaid and the stocks, funds, and securities in or upon which the same shall be invested, upon and for the trusts, intents, and purposes following, (that is to say),

—power to vary securities, but with the consent of wife during her life;

—trust to pay income to wife for her life;

43 *c*[2]. UPON TRUST, during the life of my said wife, [*name*], to pay the annual produce and income of the said trust-monies, stocks, funds, or securities unto my said wife or her assigns, for her or their absolute benefit; And from and after the decease of my said wife, my will is, that the said trust-monies, stocks, funds, or securities shall be IN TRUST for such one or more of my children or more remote issue, who shall be living at the time of the decease of my said wife (*a*), (whether the parent or parents of such issue be then living or dead), at such age or respective ages, in such manner, and if the appointment shall extend to more than one, then in such shares and proportions, as my said wife, by any deed or deeds, revocable or irrevocable, or by her last will and testament or any testamentary writing, shall direct or appoint; And for want of such direction or appointment, or so far as the same, if incomplete, shall not extend, IN TRUST for such child or children of mine as shall attain the age of twenty-one years or marry, and if more than one, in equal shares and proportions.

—after her decease in trust for issue, according to wife's appointment by deed or will;

—in default of appointment, in trust for the children at twenty-one or marriage, equally;

—hotchpot

43 *c*[3]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that the

(*a*) [This restriction of the power of appointment to objects who shall survive the appointor, is a sufficient protection against the abuse referred to, ante, p. 536, n. (*a*). But, except under special circumstances, such a restriction is not expedient.]

share to be taken by any child of mine under or by virtue of the foregoing limitation or trust in default of appointment, shall not, when added to any share or shares to be taken by such child or any issue of such child, under or by virtue of any appointment to be made under the power hereinbefore contained, exceed the share which such child would have taken under the said limitation or trust in default of appointment, if such appointment had not been made.

clause (where there is a power to appoint to issue of living children);

43 c^4. PROVIDED ALSO, AND I HEREBY AUTHORISE my said trustees or trustee for the time being, after the decease of my said wife and during the minority of any child or other issue of mine (such other issue being issue to whom any share of or interest in the said trust premises shall have been appointed either absolutely or contingently, but subject to any direction to the contrary or restriction in such appointment to be contained), to apply towards the maintenance and education of such child or issue, all or a sufficient part of the annual produce and income from his or her presumptive or vested share; And to invest and add to the capital of such share the surplus income therefrom; With power to apply such accumulations towards the maintenance or education of the person or persons presumptively or actually entitled thereto. AND ALSO, at their or his discretion, to apply for the benefit and advancement of any such child or issue not more than one-half of his or her presumptive or vested share (*a*).

—maintenance of testator's children or more remote issue;

—accumulation;

—advancement.

43 d^1. (*Legacy to trustees, with power to invest and change securities, as in* (43 a^1) *to* (43 a^4) *inclusive*)—UPON TRUST to pay the same annual produce and income arising from the said trust-monies, stocks, funds, and securities unto my wife, [*name*], for and during her life; And after her decease to apply a competent part of the said principal sum of £—— for her burial, in case she should not leave sufficient property for that purpose; And, subject thereto, to divide the said principal sum of £——, or the residue thereof, or the investments and securities of and for the same, among such of my five children, namely, [*names*], as shall be living at the time of the decease of the survivor of myself and my said wife, and such child or children then living of any of my children who may then be dead, as shall attain the age of twenty-one years, or marry under that age, in equal shares

Legacy in trust for widow for life;

on her death to apply part of capital for her burial;

and to divide the surplus among the survivors of five children and the issue of those who may be dead.

(*a*) [If there is another fund applicable and sufficient for the purpose these clauses may be omitted.]

and proportions, as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of mine shall take such share only as his, her, or their parent would have taken if living. (*Add here, or in a subsequent part of the will, provisions for maintenance and advancement of infant grandchildren, or of minors generally*).

Direction to invest £——, or appropriate securities to that amount;

43 e^1. I DIRECT my trustees or trustee, within a year from my decease, to invest the sum of £—— sterling in their or his names or name, in the public stocks or funds, or on real security in England or Wales, (and not in Ireland); With power to appropriate for that purpose any security or securities of any of the kinds aforesaid which I may have at my decease, at the value thereof at the time of such appropriation; And with power, from time time, to vary such investments;

—in trust for nephew for life;

And to pay the income therefrom (and interest thereon at four per cent. in the meantime from my decease) to my nephew, [*name*], during his life; And after his decease to transfer the same in such manner, for the benefit of any of his child or children or other issue (born in his lifetime), as he shall by deed or will appoint; And, subject thereto, to transfer the same unto such child or children of my said nephew as shall attain the age of twenty-one years or marry, in equal shares, as between sons or as between daughters, but so that the share of a daughter shall be double the share of a son (*a*).

—then for his issue as he shall appoint;

—in default to his children, daughters taking double the shares of sons;

43 e^2. PROVIDED, that no child shall take under the foregoing limitation in default of appointment, without giving up for distribution thereunder any share or interest which may have been appointed to him or her.

—hotchpot;

—maintenance;

43 e^3. I AUTHORISE my trustees or trustee, after the decease of my said nephew, to apply towards the maintenance and education of each his infant and unmarried child or other issue, all or a competent part of the income from his or her presump-

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On the common preference of males in family settlements.

(*a*) [The reverse of this arrangement would be more in accordance with the view too generally taken of the relative claims of sons and daughters to a provision. But, at least while the usages of society deny to the majority of women the means of obtaining a subsistence in any but the matrimonial market, it is not easy to see why, if a distinction is made, it should not be in their favour. The functions of a Cornelia have long since ceased to be peculiarly useful, dignified, or elevating. If it is said that the fund will be more likely to fructify in the hands of the brothers, let there be at least some security provided that it shall do so, and let the sisters be relieved from a position at the best but equivocal and dependent, by giving them a right to participate in the fruits.]

tive share; And to invest and add to the capital of such share the surplus income therefrom; With power to apply such accumulations towards the maintenance or education of the person or persons presumptively entitled thereto; AND, at their or his discretion, to apply for the benefit of any such child or issue not more than one-half of his or her presumptive share. —advancement.

43 *f*. I GIVE to my said trustees the sum of £——, with interest thereon at £5 per centum from the day of my decease, UPON TRUST that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, will invest the said principal sum in the public funds, or on real security in England or Wales, (and not in Ireland), with power from time to time to vary such investment; And will be possessed of the said sum and the securities for the same, UPON TRUST to transfer not more than one moiety thereof in such manner as my step-daughter [*name*], wife of [*name*], shall at any time or times, notwithstanding coverture, by deed appoint; And, subject thereto, to pay the income from the said fund to her for her separate and inalienable use for life; And, after her decease, to transfer the capital thereof in such manner as she shall, by will or (while sole) by deed, appoint; And, subject to any such appointment, to transfer the same in such manner as if the same were part of her personal estate, and she had died intestate without leaving a husband, and not indebted.

Legacy to trustees; —to invest; —in trust, as to one moiety, as A. shall appoint, subject thereto for her separate and inalienable use for life, and as she shall appoint by will (or while sole by deed). In default, for her next of kin.

43 *g*[1]. I GIVE AND BEQUEATH unto the said [*trustees*], their executors, administrators, and assigns, all my bonds and notes of the East India Company, and all other my stocks, funds, mortgages, and securities for money, of which I shall be possessed at the time of my decease, and all the lands, tenements, and hereditaments included in any mortgage or mortgages, and all my shares in any joint stock company or companies, either in Great Britain or elsewhere (except policies of insurance), and all the principal and interest monies, dividends, bonuses, and profits, which shall be owing on the said several notes, stocks, funds, mortgages, and securities respectively, at the time of my decease, unto the said [*trustees*], their heirs, executors, administrators, and assigns, upon the trusts hereinafter expressed and declared of and concerning the same (that is to say),

Bequest of notes of the E. I. Company, mortgages, shares, and other securities to trustees;

43 *g*[2]. UPON TRUST, that they the said [*trustees*], the survivors or survivor of them, or the executors or administrators —power to convert with consent of le-

gatee or legatees for life; of such survivors or survivor, or other my trustees or trustee for the time being, will either permit the whole or any part of the said trust-monies, funds, securities and premises to remain in their present actual state of investment, or [with the consent in writing of my wife (*a*), [*name*], during her life, and after her decease], as to the part or share or parts or shares of or in the said trust-monies, funds, securities and premises whereof the annual produce and income (after deducting the annuity of £—— hereinafter given to my wife, if the same be payable) (*b*), shall for the time being be payable to any adult person or persons for life under the trusts hereinafter declared (if any), or, in case the annual produce or income of the whole of the said trust-monies, funds, securities, or premises should for the time being be payable to any adult person or persons for life, then as to the whole of the said trust-monies, funds, securities, and premises, with the consent in writing of such adult person or persons, and as to the part or share or parts or shares of or in the said trust-monies, funds, securities and premises whereof the annual produce and income shall not for the time being be so payable to any adult person, and as to the whole of the said trust-monies, funds, securities, and premises, in case the annual produce and income of no part thereof should for the time being be so payable to any adult person, at the discretion of my said trustees or trustee for the time being, will sell and dispose of or convert into money the said trust-funds, securities, and premises

—and to invest; or any part thereof, and invest the monies to arise thereby, in the names or name of my said trustees or trustee for the time being, in or upon any of the public stocks or funds of Great Britain, or at interest upon real securities in England

—power to vary investments with consent of legatee for life; or Wales (and not in Ireland); And from time to time, with such consent or at such discretion as aforesaid, alter, vary or transpose the investments of the said trust-monies, funds, and premises.

—trustees to be possessed of trust-funds, in trust, &c. 43 *g*[3]. And I direct and declare, that my said trustees or trustee for the time being shall stand and be possessed of and interested in the said trust-monies, funds, securities, and premises, and the proceeds thereof, and the stocks, funds, and

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(*a*) [The widow takes only an annuity, and therefore her consent is not to be imposed as a condition of course. But the testator's confidence in her prudence may induce him to give her a veto.]

(*b*) [This parenthesis will be omitted if the widow's sanction to a change of investments is made requisite.]

securities in or on which the same shall for the time being be invested. (*For ulterior trusts, see* TRUSTS OF PERSONALTY.)

Legacy to trustees, in trust to invest;

43 *h*[1]. I GIVE AND BEQUEATH unto my said trustees the sum of £—— sterling, to be appropriated as soon as convenient after my decease, with interest thereon at the rate of £5 per centum per annum from the day of my decease (such interest to be applied as if the same were income arising from the investment of the said principal sum): UPON TRUST, that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, will invest the said legacy or sum of £——, in their or his names or name, in the public stocks or funds, or at interest upon real securities in England or Wales, and not in Ireland.

—power to vary investments with consent of legatee or legatees for life; (*Concise form*).

43 *h*[2]. WITH POWER for my said trustees or trustee for the time being, from time to time, with the consent in writing of my said wife during her life, and after her decease, as to any part or share or parts or shares of or in the said trust-monies, funds, and premises, whereof the annual produce and income shall for the time being be payable to any adult person or persons for life under the trusts hereinafter declared, or, in case the annual produce and income of the whole of the said trust-monies, funds and securities should for the time being be so payable to any adult person or persons, then as to the whole of the said trust-monies, funds, and securities, with the consent in writing of such adult person or persons, and as to any part or share or parts or shares of the said trust-monies, funds, and securities whereof the annual produce shall not for the time being be payable to any adult person or persons, and as to the whole of the said trust-monies, funds and securities, in case the annual produce and income of no part thereof should, for the time being, be payable to any adult person or persons, at the sole discretion of my said trustees or trustee for the time being, to alter, vary, and transpose the investments of the said trust-monies, or any part or parts thereof.

—to be possessed in trust.

43 *h*[3]. AND I DIRECT AND DECLARE that my said trustees or trustee for the time being shall stand and be possessed of and interested in the said trust-monies, funds, and securities. (*For trusts, see the forms of* TRUSTS OF PERSONALTY.)

Legacy of Consols to trustees, clear of legacy duty;

43 *i*. I GIVE AND BEQUEATH to the said [*trustees*] £—— Consolidated Three Pounds per centum Annuities, to be retained, appropriated, or purchased by them out of my personal estate within three calendar months after my decease,

and to be held upon the trusts hereinafter declared concerning the same; And I direct, that the legacy duty payable on the said sum of £—— Consolidated Three Pounds per centum Annuities, shall be paid out of my residuary personal estate. And I direct and declare, that the said [*trustees*] and the survivors and survivor of them, and the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will, do and shall stand possessed of the said £—— Consolidated Three Pounds per centum Annuities hereinbefore bequeathed (*a*), Upon trust (*for separate use of daughter*, (43 *a* [5])); And after the decease of my said daughter [*name*] Upon trust to pay the said annual produce and income unto the surviving husband of my said daughter (if any), for his own use, during his life; And after the decease of my said daughter and her surviving husband (if any), to stand possessed of the said trust-monies, funds, and premises, and the annual produce thereof, In trust for such child or children of my said daughter [*name*] by [her deceased], her present, or any future husband, as shall attain the age of twenty-one years, or (being a daughter or daughters) shall attain the age of twenty-one years or be married under that age; Provided always, that such child or children of any son of my said daughter [*name*], who shall die under the age of twenty-one years, as shall attain the age of twenty-one years or marry under that age, shall be entitled, and if more than one, equally, to the share in the said trust-monies, funds, and premises to which such son respectively would have been entitled if he had attained the said age. And in case there should be no child or grandchild of the said [*daughter*], who (being a son) shall attain the age of twenty-one years, or (being a daughter or grandchild) shall attain the said age or be married, then In trust for such person or persons as my said daughter, [*name*], whether covert or sole, shall by any deed or will appoint; And in default of and subject to any such appointment, In trust for the person or persons who, at the time of the decease of my said daughter, would be entitled to her personal estate in case she had then died intestate and without leaving a husband, in the like shares and proportions as such per-

—in trust for testator's daughter for separate and inalienable use; after her decease,

in trust for survivor for life; and after his or her decease,

the capital for children of daughter;

—substitution of children of sons dying before majority;

—in default of issue, in trust for such persons as daughters shall appoint;

and in default of appointment, for her next of kin.

Power to vary investments.

(*a*) [Here, it will be observed, that there is no power to vary investments, a power often exercised with little benefit to the objects of the trusts.]

sons (if more than one) would be entitled thereto. *(Add maintenance and advancement clauses, applicable, either specially, to the objects of this trust, as in* (43 a^{12}), (43 a^{13}), *omitting the references to appointments, or, generally, to all minors taking any legacies or portions under the will.)*

43 k^1. I GIVE AND BEQUEATH to my said trustees the sum of £—— sterling, to be retained and appropriated by them within six calendar months after my decease, and, if not then appropriated, with interest at £4 per centum per annum from the expiration of the said six months, UPON TRUST, to place out the same in the names or name of my said trustees or trustee for the time being in the public stocks or funds of the United Kingdom, or at interest upon real securities, with full power from time to time, at their or his discretion, to alter, vary, and transpose such stocks, funds, and securities, and to stand possessed thereof, upon the trusts following (that is to say), UPON TRUST, from time to time, to pay the annual produce and income arising from the said trust-fund into the proper hands of my aunt, [*name*], for and during her life, so that the same may be for her sole and separate use, free from the control, debts, and engagments of her present or any future husband, and so that she may not have power to alienate, dispose of, engage, or receive the same or any part thereof, by way of anticipation, subject nevertheless to the proviso hereinafter contained; And from and after her decease, UPON TRUST, to pay or transfer the said trust-monies, funds, and securities, unto and between [*names*], two of the daughters of my said aunt, or their respective executors, administrators, or assigns, in equal shares and proportions, the same to be vested interests in them respectively immediately on my decease.

Legacy to trustees, to be invested,

in trust for inalienable use of testator's aunt (a married woman) for life;

and after her decease, upon trust for her two daughters;

43 k^2. AND I DECLARE, that in case at any time or times hereafter the said [*aunt*] should, from disease or infirmity or any other cause, be incapable of giving a discharge for the said annual produce and income, it shall be lawful for my said trustees or trustee for the time being to apply the same in such manner for her benefit as they or he, in their or his discretion, shall think proper (*a*).

—if cestui que trust become imbecile, &c., trustees may apply income for her benefit;

43 k^3. PROVIDED ALSO, AND I FURTHER DECLARE, that, in case the said [*aunt*] should at any time, while discovert, assign

—proviso for cesser of life interest on alienation.

(*a*) This trust is adapted to the case of a person who is subject to attacks of lunacy, or labours under any other species of mental imbecility. A trust in favour of a deaf and dumb person also requires some such provision.

As to trusts in favour of persons of weak mind, &c.

or dispose of the said annual produce and income of the said trust-monies, funds, and securities, or any part thereof or interest therein, or in case by any means whatsoever the same should (or, but for this present proviso, would) become vested in or payable to any husband of the said [*aunt*], or any other person or persons, then and in such case the trust hereinbefore declared in favour of the said [*aunt*] shall immediately thereupon cease, and the said annual produce and income shall and may, during the remainder of her life, be applied by the said trustees or trustee for the time being to and for the benefit of [her the said [*aunt*] (*a*), and] the child or children or more remote issue for the time being of the said [*aunt*], or some or one of such objects exclusively, and in such shares, if more than one, as my said trustees or trustee in their or his absolute and uncontrolled discretion shall think proper.

(*Trusts of residue*)—to appropriate a certain amount of stock;

43 *l*[1]. And upon further trust, that my said trustees or trustee for the time being shall appropriate and set apart the sum of £—— Consolidated Three Pounds per Centum Annuities, if there be a sufficient sum in that stock standing in my name at the time of my decease, and if not, then shall purchase the same in their or his names or name, and shall stand and be possessed thereof, Upon the trusts following, (that is to say,) as to the sum of £—— Consolidated Three Pounds per Centum Annuities (being one moiety or half part of the said sum of £—— Consolidated Three Pounds per Centum Annuities),

—as to one moiety thereof,

in trust for second son and his wife successively for life;

43 *l*[2]. Upon trust to pay the annual produce and income thereof into the proper hands of my son, [*second son*], during his life, for his own use and benefit, subject nevertheless to the proviso hereinafter contained concerning the same; And after the decease of my said son [*second son*], then

43 *l*[3]. Upon trust to pay the annual produce and income arising from the same sum of £—— Consolidated Three Pounds per Centum Annuities, into the proper hands of [*name*], the wife of my said son [*second son*], for and during her life, so that the same may be for her separate use, free from the control, debts, and engagements of her husband for the

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As to objects of gift over on alienation.

(*a*) [These words seem to be improper, because they would not effectuate the object intended, and might mislead the trustees. The aunt's assignment during discoverture would entitle her assignee to charge the trustees with everything they subsequently paid to or expended on her. See ante, p. 486, n. (*a*).

time being, and so that she may not have power to alienate, dispose of, engage or receive the same or any part thereof by way of anticipation;

43 *l*[4]. And, from and after the decease of the survivor of them the said [*second son*], and [*name*], his wife, then Upon trust to pay or transfer the same sum of £—— Consolidated Three Pounds per Centum Annuities, and the annual produce and income arising therefrom, unto, between, or amongst such child or children of my said son [*second son*] as shall attain the age of twenty-one years, and such child or children of any child of my said son [*second son*] dying under the age of twenty-one years, as shall attain that age or die under that age leaving issue, and if more than one in equal shares and proportions as between brothers and sisters, but so that the child or the children collectively of any deceased child of my said son shall take such share only as their parent would have taken if living. And if there should be no such issue, then, subject to the trusts aforesaid, Upon the trusts hereinafter declared concerning the other moiety of the said sum of £—— Consolidated Annuities.

—then for children;

—cross limitation over on failure of children;

43 *l*[5]. And as to the sum of £—— Consolidated Three Pounds per Centum Annuities, (being the other moiety or half part of the said sum of £—— Consolidated Three Pounds per Centum Annuities), Upon trust to pay the annual produce and income arising therefrom into the proper hands of my son, [*third son*], during his life, for his own use and benefit, subject, nevertheless, to the proviso hereinafter contained concerning the same. And after the decease of my said son, [*third son*],

—as to the other moiety of stock, in trust for the third son for life;

43 *l*[6]. Upon trust to transfer and pay the last-mentioned sum of £—— Consolidated Three Pounds per Centum Annuities, and the annual produce and income arising therefrom, unto, between, or amongst such child or children of my said son [*third son*], as shall attain the age of twenty-one years, and such child or children of any child of my said son, [*third son*], dying under the age of twenty-one years as shall attain that age, or die under that age leaving issue, and if more than one in equal shares and proportions as between brothers and sisters, but so that the child or the children collectively of any child of my said son shall take such share only as their parent would have taken if living. And if there should be no such issue, then, subject to the trusts aforesaid, Upon the trusts hereinbefore declared concerning the first-mentioned moiety of the said sum of £—— Consolidated Annuities.

—then for children;

—cross limitation over on failure of children;

—proviso determining the life interest of sons on alienation, bankruptcy, &c.;

43 *l*[7]. PROVIDED ALWAYS, AND I HEREBY DIRECT, that in case either or both of my said sons, [*names*], should, at any time or times, do, commit, or suffer any act, default, or process whatsoever which but for this proviso would have the effect of vesting the right to receive the annual produce and income hereinbefore directed to be paid to him or them respectively or any part thereof or interest therein respectively, in any other person or persons whomsoever, then and thenceforth the trust hereinbefore declared for the benefit of such son or sons respectively shall cease and be void; And the annual produce and income, the trust whereof shall so cease or become void, shall, immediately thereafter, be paid or payable to or applicable for the benefit of the person or persons who would have been entitled to the same respectively by virtue of the trusts, powers, or authorities herein contained, in case such son or sons respectively had departed this life.

—annual income to go to the ulterior cestuis que trust;

—power to third son to appoint income to wife for life;

43 *l*[8]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that, notwithstanding the trusts hereinbefore contained, [and in derogation of, and precedence to, such of the same trusts as are subsequent or posterior to the said trust created or declared unto or in favour of my said son [*third son*] during his life, determinable nevertheless as aforesaid, but subject and without prejudice to such determinable trust (*a*),] it shall be lawful for my said son [*third son*], either before or after marriage, by deed or will, to appoint and dispose of the annual produce and income of the said sum of £—— Consolidated Three Pounds per Centum Annuities, the trusts whereof are lastly hereinbefore declared, or any part thereof, unto or in favour of any wife or widow for the time being of my said son [*third son*], for and during her life, either absolutely, or subject to such conditions and restrictions, and in such manner in all respects, as my said son shall think proper (*b*). (*Maintenance and advancement clauses*, (43 *l*[8]), (43 *l*[9]), (43 *l*[10])).

(*a*) [The words within brackets are merely superfluous.]

(*b*) This power would enable the son to make a settlement on an intended wife out of the trust fund.

As to authorising tenant for life of personalty to appoint a life interest to his widow.

A power of creating a provision for a wife is often a proper and convenient appendage to a life interest given to a male person, though such powers have certainly not obtained so general adoption, in reference to personalty, as the power of jointuring, which is ordinarily given to a tenant for life of real estate. The power in the text is made to extend over the whole fund, and to take effect, in derogation as well of the trusts in favour of the children of the donee, as of the ulterior objects. Sometimes, however, it is restricted to a definite share as against the

43 *l*[9]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for my said trustees or trustee, after the determination of the prior life-interest or life-interests (if any) hereby created or to be created by any appointment in exercise of any power herein contained, to apply all or any part of the annual produce and income of the presumptive legacy, share, or portion of any [child] grandchild or other issue [of mine] [*or*, of the said [*name*],] under my will, or any appointment to be made in exercise of any power herein contained (but subject to any contrary or different direction in any such appointment to be contained), for or towards his or her maintenance and education, until such legacy, share, or portion shall become payable; And that my said trustees or trustee may pay any such money to any parent or guardian of any such [child] grandchild or issue, for the purpose aforesaid, without seeing to the application thereof.

—provision for maintenance of grandchildren and other issue presumptively entitled to any legacy or portion, where some of the pending life-interests are to cease on alienation; (*general form*);

43 *l*[10]. AND that my said trustees shall from time to time accumulate all the residue (if any) of such annual produce and income, and invest the same and the resulting produce and income thereof, and shall add such accumulations to the principal fund from which the same shall have arisen; With power nevertheless to resort to any such accumulations for the maintenance or education of the person or persons for the time being presumptively entitled thereto.

—accumulation;

43 *l*[11]. PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that it shall be lawful for my said trustees or trustee, at any time or times after the determination of any prior life-interest or life-interests (if any) hereby created or to be created by any appointment in exercise of any power herein contained, at their or his own discretion, or, previously to such determination, with the consent in writing of the person or persons entitled to such prior life-interest or life-interests, to raise and apply not more than one-half of the presumptive legacy, share, or portion of any such [child] grandchild or other issue for the advancement in the world or benefit of such [child] grandchild or other issue (but subject to any contrary or different direction in any such appointment to be contained).

—power to advance shares of testator's issue, where life-interests are to cease on alienation; (*general form*);

43 *l*[12]. PROVIDED ALSO that the cesser of the life-interest of either or both of my said sons, under the proviso hereinbefore contained, shall not exclude his or their after-born children or issue from participating in the trust premises.

—cesser of life-interest not to exclude after-born children.

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children, and extended to the entirety as against the persons to whom the property is limited in default of children, as in (43 *m*).

Power to third son to settle on wife a moiety of income as against children, and the whole income as against the ulterior cestuis que trust.

43 *m*. PROVIDED ALWAYS, AND I HEREBY DECLARE, that, notwithstanding the trusts hereinbefore contained, [and in derogation of, and in precedence to, such of the same trusts as are subsequent or posterior to the said determinable trust created or declared in favour of my said son [*third son*] during his life, but subject and without prejudice to such determinable trust,] it shall be lawful for my said son [*third son*], either before or after marriage, by deed or will, to appoint or dispose of one moiety or equal half part of the annual produce and income of the said sum of £—— Consolidated Annuities, and in case my said son [*third son*] should have no child who shall live to acquire an absolutely vested interest in the said Consolidated Annuities under the trusts aforesaid, then the whole or entirety of the said annual produce and income, or any part thereof, unto or in favour of any wife or widow for the time being of the said [*third son*], for and during her life, either absolutely or conditionally, and in such manner in all respects as my said son shall think proper.

Proviso for cesser in case of daughter assigning her life-interest whilst discovert.

43 n^1. PROVIDED ALWAYS, AND I HEREBY DIRECT AND DECLARE, that, if my said daughter, [*name*], should at any time or times, whilst sole, do, commit, or suffer any default or process whatsoever, which, but for this proviso, would have the effect of vesting the right to receive the annual produce and income hereinbefore directed to be paid to her, or any part thereof or interest therein, in any future husband or in any other person or persons other than my said daughter, [*name*],

43 n^2. THEN, and in every such case, my said trustees or trustee for the time being shall thenceforth, for the residue of my said daughter's life, apply the whole of such annual produce and income in such manner as they or he shall, in their or his uncontrolled discretion, think fit, for the benefit of all or any one or more, exclusively of the other or others, of [my said daughter, and] such person or persons as would, under the trusts of my will, be for the time being exclusively entitled thereto in case my said daughter were then dead (*a*). But such cesser of my said daughter's life-interest shall not exclude her after-born children or issue from participating in the said trust premises.

Remarks on the power given to the trustees by the clause in the text.

(*a*) The competency of the daughter to take any benefit of the proviso may by some be questioned. It may be thought, that any interest acquired by the daughter through the selecting power of the trustees, is to be regarded as a portion or remnant of the interest she derived under the prior trust, which she has already parted with, and

PROVIDED ALWAYS, that it shall be lawful for my trustees or trustee, during all or any part of the term of twenty-one

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that the attempt to restore to her any portion of such interest after her assignment is a fraud upon the assignee. It would be difficult to combat these objections, if the power were a mere power of regulating or modifying the shares of the objects (i. e. a power of distribution), and the daughter was one of those objects; but when it is considered that the power authorises the total exclusion of the daughter, there seems to be strong ground to contend that the interest conferred by the act of the trustees in her favour constitutes a new and independent acquisition. This view of the matter supposes the assignment by the daughter not to embrace her future acquisitions under the power. An assignment extending to such acquisitions would, it is conceived, take from the trustees the power of applying any portion of the income in question to the benefit of the assignor, but would be of little value to the assignee, as it would not prevent the trustees from applying the whole to the other objects.

Inefficiency of discretionary power to trustees to divide the fund given over on alienation or bankruptcy among other objects, *and also* the assignor or bankrupt.

So, if the cestui que trust, whose interest is qualified by provisoes such as those in the text, becomes bankrupt or insolvent, possibly the Courts, with that jealous regard to the interests of creditors which has always characterised the judicial expositors of clauses of this nature, (of which we have an instance in the case of *Piercy* v. *Roberts*, 1 Myl. & Kee. 4), would hold, that the trustees' discretion was so far determined by the bankruptcy or insolvency of the cestui que trust, that they could not confer any benefit on her under their power of application, which would not immediately become subject to the claims of her creditors, but who of course could not compel the trustees to exercise their discretionary power in her or rather in their favour. [The following remarks were published by Mr. Jarman, before the case of *Massey* v. *Parker*, 2 Myl. & Kee. 174, was overruled.]

"Again, suppose the cesser-proviso to be called into operation by the daughter's marrying without making a settlement, a material question would then be, whether (assuming the doctrine of *Massey* v. *Parker* to be law) the trustees could defeat the marital claim by paying the income to the separate use of the wife. It is conceived that they might, by force of the principle already alluded to, namely, that the interest derived by the act of the trustees is to be regarded as a new and independent acquisition. In fact, the trustees would, in all probability, be able to obtain the assent of the husband to the income being so paid, by making it the condition of their applying *any* part for her benefit. Upon the whole, therefore, it appears to be expedient to vest a power of this nature in trustees on the cesser-proviso taking effect, rather than wholly to exclude the offending cestui que trust, by creating an absolute trust in favour of any other person, which is a harsher measure than a testator, who qualifies the interest of his legatee with such a proviso, commonly intends. He only wishes to carry his punitive infliction so far as to supply a sufficient motive to the observance of his restriction—a restriction, let it be remembered, imposed solely with a view to the benefit of the legatee herself."

[That, after forfeiture committed during discoverture, a life-interest

years from my decease, to accumulate all or any part of such annual produce and income, and add the same to the capital of

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may be effectually limited for the separate and inalienable use of the same party during any subsequent coverture, as a new and independent acquisition, is a deduction from the general rule of equity in favour of married women, not yet sanctioned by authority, and carrying that doctrine beyond the point reached in *Tullett* v. *Armstrong*, 4 Myl. & Cr. 377. As a general rule, it is indisputable, that a woman, while sole, may in equity dispose of all property to be acquired by her during any future coverture, although given to her for her separate use. To this rule it is no exception that an assignment by the act of marriage does not entitle the husband even to property belonging to the woman before marriage, if it is impressed with a trust for her separate use, for a trust for separate use implies no restraint on alienation, and the protection of property subjected to such a trust, where no actual assignment is made, is merely an inference of equity, from the circumstances and behaviour of the parties, that they did not intend it to pass by the effect of the marriage contract. When a prohibition on alienation is annexed to the trust, the inference is only the stronger; so that it now appears inexplicable how, the efficacy of the separate trust in respect of future coverture having been conceded, that of the restriction on alienation could ever have been denied, as it was in *Massey* v. *Parker*. Before the doubts arose which have ended in the complete establishment of trusts for the inalienable use of married women during future coverture, it was held, first by Sir W. Grant, and afterwards by Lord Brougham, in two cases, that such a trust did not restrain the woman, while single, from alienating her entire interest: *Jones* v. *Salter*, 2 Russ. & M. 208; *Brown* v. *Pocock*, 2 Russ. & M. 210, 2 Myl. & K. 189. In *Woodmeston* v. *Walker*, 2 Russ. & M. 197, Sir J. Leach, M. R., in ignorance of the decision in *Jones* v. *Salter*, had held, that the interest to accrue on a future marriage was inalienable during discoverture. But this decision was overruled by Lord Brougham, who, however, did not decide that the object was unattainable. His Lordship observed: "It was said that the woman might have the property at her own disposal until she married, and that when that event happened a sort of postponed fetter might attach, a fetter which would fall off upon her husband's death, and be again imposed should she enter into a second marriage. That would be a strange and anomalous species of estate; nor is it very easy to conceive by what process or contrivance it could be effectually created, unless, perhaps, by annexing to the gift a limitation over to trustees to preserve it for the woman during the successive covertures. But it is unnecessary to consider that question, as no such contrivance has been resorted to in this case. Here the bequest is merely coupled with a naked prohibition against alienation by the legatee." (See, also, the observations of Lord Cottenham on these cases, 4 Myl. & Cr. 397.) These decisions, then, apply to the case where the prohibition is to be read as extending to assignments during coverture, and do not extend to assignments before marriage of the interest to accrue during marriage, or settle the invalidity of a restraint on such assignments. If that restraint is invalid, its invalidity must depend upon considerations of policy which

the fund from which the same shall arise, with power, nevertheless, at any time or times to resort to and apply such accumulations in the same manner as if the same were income then accruing, (*or, instead of this clause substitute* (43 *o*).)

43 *o*. THEN, and in every such case, my said trustees or trustee for the time being shall thenceforth, during her life, pay and apply the said annual produce and income unto the person or persons who would for the time being be entitled thereto under the trusts of my said will if my said daughter were dead.

Variation where the forfeited fund is given over absolutely.

44. I GIVE AND BEQUEATH to the said [*trustees*], the sum of £—— sterling, with interest thereon at the rate of £4 per centum per annum from my decease, UPON TRUST, that the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, will and shall

Legacy in trust to be applied as married daughter shall appoint; in default to be invested for her separate use for life, and then (*a*)—

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no device of the draughtsman could be allowed to defeat. Is, then, the invalidity of such a provision a necessary deduction from the doctrine of equity, that property cannot be deprived of its legal incidents except during coverture—that, in other words, where coverture does not exist, equity follows the rules of law with regard to the alienation of property? In answer to this question, it may be replied, that equity does not invariably follow the law with regard to the incidents of property. If it did, a contingent life-interest in land, (which was until lately inalienable at law), and choses in action, could not be assigned in equity. Equity does not follow the law where the law is at variance with its own notions. Equity, by simply following the law, could now, with respect at least to trusts of personalty, give full effect to provisions for future coverture. If it refuses to do so to the extent of protecting such provisions from the act of the woman while sole, its refusal must be founded on grounds of policy, and not on technical refinements. The true ground of the decision in *Brandon* v. *Robinson*, 18 Ves. 429, was, not that equity must follow the law, but that to allow restrictions on alienation by persons sui juris would be injurious to society. In the case of a married woman, equity sees reason for permitting such restrictions. In the eye of equity, it is not against public policy to allow property to be settled on a woman when she marries, or after she has married, so as to be inalienable during the coverture. Would it be more injurious to credit to allow such a trust to be created before, and without reference to, any intended marriage, so as to be indefeasible (with respect to the interest during coverture) in the interval before marriage? Is there any reason, either technical or substantial, for saying that "a fund given, in case a feme sole shall marry, to trustees for her separate use without power of anticipation, would be a present interest in her, and, of course, disposable by her being sole" (1 Hayes' Conv. 515)?]

(*a*) [Trusts of this kind are useful when the husband of the legatee is imbecile or improvident, or when, for any other reason, it is desired

from time to time pay, deal with, and dispose of the same or any funds or securities in or upon which the same or any part thereof may for the time being be invested, to such person or persons, or in such manner, as my daughter, [*name*], the wife of [*name*], shall by any writing direct or appoint; And, in case no such direction or appointment be made, and, in the meantime, subject to any such direction or appointment, and as to so much of the said sum of £—— as shall not for the time being have been otherwise disposed of, (*Trust to invest* (43 b^2) *income to daughter for life, for her separate use* (43 a^5); *Capital for her children* (43 a^8); *Maintenance and advancement* (43 a^{12}) (43 a^{13}).)

CHARITY LEGACIES.

Legacies to be invested for benefit of Master of Grammar School.

45 *a*. I DIRECT my trustees or trustee to purchase, out of such part of my personal estate as may be lawfully devoted to charitable purposes, and in priority to all other [pecuniary] legacies given by my will, [whether specific or pecuniary], the sum of £1——, Consolidated Three Pounds per Centum Annuities, to be invested in the names of the trustees for the time being of the Free Grammar School at ——, or in the names or name of such persons or person as such trustees shall from time to time appoint, IN TRUST to pay and apply the income therefrom in augmentation of the salary or stipend of the head master for the time being of the said school for ever.

45 *b*. I GIVE to the Infirmary at —— the sum of £——, to be paid to the treasurer for the time being thereof, at the end of twelve calendar months from my decease, out of such part of my personal estate as the law permits to be bequeathed to charitable purposes.

45 *c*. I GIVE AND BEQUEATH unto the British and Foreign Bible Society the sum of £——, and to the Infirmary at ——, in the county of ——, my native town, the sum of £——. AND I DIRECT, that the said legacies respectively shall be paid to the treasurers for the time being of the said several institutions, to be applied to the general purposes thereof respectively. AND I DIRECT, that the said two last-mentioned legacies

Direction as to

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to give to a married woman an absolute power of the principal. They amount, in effect, to a gift of the principal for the legatee's separate use, the limitations in default of appointment being merely useful for the purpose of regulating the destination of the property in case she should neglect to make a will. See *Molony* v. *Kennedy*, 10 Sim. 258; *Johnston* v. *Lumb*, 15 Sim. 308.]

shall be fully paid out of such part of my personal estate as may legally be devoted to charitable purposes, and shall be paid out of that fund in preference to all other pecuniary legacies bequeathed by this my will (*a*). [PROVIDED ALWAYS, that in case my personal estate, of whatever kind, should not be sufficient to pay all the legacies given by my will in full, then and in such case the two charitable legacies hereinbefore bequeathed shall abate rateably and in proportion with the other legacies.] fund for payment.

45 *d*. I GIVE to the minister and churchwardens of the respective parishes of —— and ——, in the county of ——, where my estates are situate, out of such part of my personal estate as the law permits to be bequeathed for charitable purposes, the sum of £—— for each parish or place, to be by the minister and churchwardens of the respective parishes laid out in the purchase of fuel, clothes, meat, or bread, and distributed by them, in their discretion, amongst the poor of such parishes, at the Christmas following my death.

45 *e*. IN THE FIRST PLACE, I GIVE, out of such part of my estate as may be lawfully applied for that purpose, and in priority to all other legacies given by my will, to the treasurer for the time being of the Royal Institution of Great Britain the sum of £——, to be invested on permanent security, and kept apart as a fund, to be called "——'s Fund;" the income whereof I DESIRE the President and Council of the said Institution, annually, and not by anticipation, to apply in such manner as they may deem expedient for the advancement of science. To a scientific institution.

45 *f*. I GIVE AND BEQUEATH the sum of £—— to the Governors of the —— Infirmary, to be raised out of such part of my personal estate as may be lawfully applied for that purpose, and to be paid at the expiration of six calendar months next after my decease, but without interest in the meantime, and to be applied in carrying on and supporting the charitable design of the same society; But upon the express condition, that the said Governors do and shall, on the receipt of the said £——, authorise and empower, by some writing under their To a charity, upon condition.

(*a*) [A direction that the charitable legacies shall be paid out of the pure personalty is sufficient to entitle the charity to the full amount of the legacy as against the next of kin; but, in order to save the charitable legacies from abatement in case the pure personalty should be insufficient to pay not only those legacies but also all the other pecuniary legacies given by the will, an express declaration that they shall have priority, seems to be necessary: *Sturge* v. *Dimsdale*, 6 Beav. 462. Vide ante, p. 149.] Direction as to fund for payment of charity legacies.

hands, the churchwardens for the time being of the parish of —— aforesaid, to recommend and procure the admittance of two in-patients annually into the said Infirmary for ever; And in case the said Governors should refuse or neglect by the space of six calendar months after my decease to sign such authority or permission as aforesaid, then, and in such case, I do hereby absolutely REVOKE the said legacy of £——.

Sum to be invested in names of Bishop of —— and minister and churchwardens of ——,

45 *g*. AND I HEREBY DIRECT, that my said trustees or trustee for the time being shall, within twelve calendar months next after my decease, by, with, and out of such part of my personal estate as may lawfully be given for charitable purposes, and in priority to other legacies given by my will, raise the sum of £——, and lay out and invest the same sum in the public stocks or funds of Great Britain, in the names or name of the persons who at the time of such investment shall respectively be the Bishop of ——, and the minister and churchwardens of the parish of —— aforesaid, for the time being, in such manner as to produce by the dividends thereof equal quarterly sums (*a*); And my will is, that the Bishop of ——, and the minister and churchwardens of the parish of —— aforesaid for the time being, shall receive and take the dividends of the stocks and funds as and when the same shall become due and payable, and shall lay out the same in such manner as they shall think most advisable for the education, in such useful learning and arts as they shall think best, of as many poor children as the amount of the fund will reasonably permit. PROVIDED ALWAYS, and I hereby declare, that the Bishop of ——, and the minister and churchwardens for the time being of the parish of —— aforesaid, shall be the trustees and administrators of the said fund; and that when the trustees for the time being, in whose names the stocks or funds to be purchased with the said £—— shall stand, shall, by death or otherwise, be reduced to three, then and in such case, and so often as the same shall happen, the same stocks and funds shall be transferred into the joint names of the Bishop of ——, and the minister and churchwardens of the parish of —— aforesaid for the time being.

for education of poor children;

—direction as to change of trustees.

Charitable legacies to be paid out of pure personalty;

45 *h*. I DIRECT, that the legacies for charitable purposes, given by my will or any codicil thereto, shall be paid clear of legacy duty, and exclusively out of such part of my personal estate, not specifically bequeathed, as may lawfully be given for such

(*a*) [As, by purchasing equal sums of Consols and Reduced Annuities. Vide ante, p. 457].

purposes; And that such legacies shall abate only in case there should be no other fund for the payment in full of the other legacies given by me; in which case I direct that such charitable legacies shall abate [before any other legacy] [rateably with the other pecuniary or general legacies.]

—other legacies thrown on the other funds;

—charitable legacies to abate before others.

BEQUESTS OF RESIDUARY PERSONALTY.

46 *a*[1]. And, as to all the personal estate and effects whatsoever and wheresoever ([including] [*or*, except] leaseholds for years and other chattels real), of which I shall be possessed, or over which I shall have any power of appointment or disposition, at the time of my decease, I GIVE, BEQUEATH, AND APPOINT the same and every part thereof unto my said son, [*name*], for his own absolute use and benefit, after payment thereout of my debts, funeral expenses, and the charges of proving this my will.

Bequest of personal estate to one absolutely;

46 *a*[2]. And I GIVE AND DEVISE all the freehold, copyhold, and customary hereditaments vested in me by way of mortgage, To SUCH USES as my said son, [*name*], his executors or administrators, shall at any time or times before the expiration of twenty-one years from his decease direct or appoint; and, subject thereto, To THE USE of my said son, [*name*], his heirs and assigns, for ever (*a*).

—devise of mortgage estates to such uses as residuary legatee shall appoint; in default, to him in fee.

46 *b*. And, as to all the residue and remainder of the personal estate and effects whatsoever and wheresoever (including chattels real), of which I shall be possessed at the time of my decease, or over which I have or shall have any disposing power, I GIVE, BEQUEATH, AND APPOINT the same and every part thereof unto my said wife for her own absolute use and benefit (*b*). (*Add devise of mortgage estates,* (46 *a*[2]).)

Residue to one absolutely.

(*a*) [Where the residuary personal estate is given beneficially to a person who is sui juris, the legal estate in mortgages should be placed under his dominion, unless the will contains other provisions for conveniently dealing with such estates.]

As to devising mortgage estates to residuary legatee.

(*b*) Where the residuary personal estate is bequeathed absolutely to a person who is sui juris, the trustees are frequently not invested with the usual discretionary powers to compound debts, pay demands, &c., which it is important they should have when any interest in the residue is given to unborn or infant persons. Some practitioners, however, deem the possibility of the residuary legatee becoming incapable by lunacy of sanctioning the acts of the trustees, or of his dying pending the adminis-

As to the insertion of powers to trustees in certain cases.

Personalty to surviving children as tenants in common.

46 *c.* I GIVE AND BEQUEATH all the monies, securities for money, and other the personal estate of which I shall be possessed at the time of my decease, unto such child and children of mine as shall survive me, and if more than one, in equal shares and proportions, to and for his, her, or their own absolute use and benefit (*a*).

Residue to surviving children.

46 *d.* AND, as to all the residue of the personal estate of which I shall be possessed at the time of my decease, or over which I have or shall have any disposing power, I GIVE, BEQUEATH, AND APPOINT the same unto, between, or among my children, in equal shares, for their own respective absolute use and benefit (*b*).

Residue to children, with substitution of issue of deceased children.

46 *e.* I GIVE AND BEQUEATH all the residue of my personal estate left after the payment of my debts, funeral and testamentary expenses, and the legacies given by my will or any codicil thereto, unto such child or children of mine as shall survive me, and the child or children living at my decease of any child or children of mine dying before me, and if more than one in equal shares and proportions as between brothers and sisters, but so that the child or the children collectively of any deceased child of mine shall take such share only as their parent would have taken if living.

Residuary bequest to several by name.

46 *f.* I GIVE AND BEQUEATH all the residue and remainder of the personal estate and effects whatsoever and wheresoever of which I shall be possessed at the time of my decease, or which

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tration of the trust affairs, (by which event minors or persons not then in esse may eventually acquire an interest in the residue), to be a sufficient ground for inserting such powers, even when the residue is absolutely bequeathed to an existing adult person.

(*a*) [The gift being to surviving children as a class, is not within the provision of the 33rd section of the Wills Act as to lapse. Generally, it is presumed the extension of the spirit of that enactment would be agreeable to the wishes of the testator, and for ordinary use one or other of the two next forms is to be preferred.]

[Where the residue is bequeathed to several persons beneficially, it is not generally advisable to devise mortgage estates to them, unless they are also executors.]

(*b*) Where the children are all adult, and the will contains no restrictions adapted to the actual or possible coverture of any, it seems unnecessary to clothe the trustees with any extraordinary powers, the beneficial legatees being competent to sanction or concur in any of their proceedings. But see note (*b*) ante, p. 559.

I have a power to dispose or appoint by this my will, unto my said daughters, [*names*], in equal shares and proportions, for their own respective absolute use and benefit.

Absolute bequest of personalty;

46 *g*. I GIVE AND BEQUEATH all the personal estate and effects whatsoever and wheresoever of which I shall be possessed at the time of my decease, or over which I now have any general power of appointment, unto my wife, [*name*], to and for her own proper and absolute use and benefit. NEVERTHELESS, I RECOMMEND to the kind and favourable regard of my said wife such of my own relations as are or may happen to be in indigent and necessitous circumstances; But I expressly DECLARE, that this recommendation shall not have the force or effect of imposing a trust on my said wife, or in any manner abridge or qualify her property and interest in the said personal estate and effects, any rule of equity to the contrary notwithstanding (*a*). (*Add devise of mortgage estates* (46 a^2).)

—recommendation in favour of certain objects, but so as not to create a trust.

Bequest of personalty to trustees;

47. I GIVE AND BEQUEATH unto my said trustees, their executors, administrators, and assigns, all my leasehold and personal estate not otherwise effectually disposed of, upon the trusts hereinafter declared: I DECLARE that my said trustees or trustee shall be possessed of my said residuary personal estate, other than the leasehold hereditaments hereinbefore disposed of, UPON TRUST to permit my wife to enjoy for her separate use during her life such household furniture, household effects, carriages, horses, harness, and gardening, dairy, and brewing utensils, and other chattels, in or about my place of residence at my decease, (except money, securities for money, title-deeds, and other documents), as she shall select; AND, subject thereto, (and as to such selected articles, after my wife's decease), to (*convert and invest, with discretionary powers, ut infra*, (48 a^2), *&c.*)

—widow to select furniture for her separate use for life.

Residuary bequest to trustees;

48 a^1. AND, as to, for, and concerning all the residue and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature, kind, or quality soever the same may be or consist, of which I shall or may be possessed

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(*a*) Words of recommendation, request, entreaty, wish, or expectation, addressed to a devisee or legatee, will create a trust for the person or persons in whose favour the testator's intention is expressed, provided he has pointed out, with sufficient precision and certainty, both the subject-matter and the objects of the intended trust. Ante, p. 254.

Effect of words of recommendation, &c., in creating a trust.

at the time of my decease, or over which I have or shall have any power of appointment or disposition by will, including therein leaseholds and chattels real, [(excepting my leasehold estates hereinafter bequeathed),] I GIVE, BEQUEATH, AND APPOINT the same and every part thereof respectively unto the said [*trustees*], their executors, administrators, and assigns,

—upon trust to collect and get in credits;

48 *a*[2]. UPON TRUST that they or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, [*if there are several sets of trustees appointed by the will say*, or other the trustees or trustee for the time being of my residuary estate,] will or shall with all convenient speed after my decease, possess, collect, and get in any monies which may be due or owing to my estate; With full powers for my said trustees or trustee, in their or his discretion, to refer to abitration, or arbitration and umpirage, any dispute concerning any debts or credits owing by or belonging to, or claimed to be owing by or belonging to my estate; And also to compound for any monies due or owing to my estate, upon such terms and in such manner as my said trustees or trustee shall think proper; And to give or allow time for the payment of any monies owing to my estate, without being answerable for any loss in respect thereof; And to pay any debt or debts claimed to be owing by me, notwithstanding the want or defect of strict legal evidence or title in support thereof (*a*); And likewise to sell and convert into money all other my residuary personal estate, except such part thereof as my said trustees or trustee shall deem it expedient to continue on the security or securi-

—powers to refer disputes, compound debts, &c.,

and to sell personalty;

As to giving the trustees proper powers.

(*a*) The investing the trustees with adequate powers is a point of great importance; otherwise their course is beset with difficulties. For instance, a trustee cannot properly pay any debt, the existence of which is not legally proved; and yet to what injustice would the rigid exaction of such proof lead? It frequently happens (such a case is within the editor's recollection), that a testator, if a man of character and extensively engaged in business, has received into his hands small sums of money, to be either retained at interest or laid out for friends; and such transactions are too often managed, in consequence of the unlimited confidence reposed in the depositary, in the loosest manner, no document whatever being required from him. In such and many other instances, without an express authority, trustees are often compelled, by a regard to their own security, to turn a deaf ear to claims, of the rectitude of which they entertain no doubt.

ties on which the same shall happen to be invested, (which they are hereby authorised to do during such time as they or he shall think fit, whatever may be the nature of such security; [*or*, except such part thereof as shall not consist of or be invested in such stocks, funds, or securities as are hereinafter authorised to be used by my said trustees or trustee as investments of trust-monies under my will;]

48 a^3. And, upon further trust, to lay out and invest the monies to be received, got in, and produced as aforesaid, and which shall arise by such sale or sales of the residue of my said personal estate, in their or his own names or name, in the public stocks or funds of Great Britain, or upon real securities in England or Wales, (and not in Ireland), at interest; —to invest;

With power for my said trustees or trustee, from time to time, at their or his discretion, to call in, receive, sell, transfer, and dispose of all or any part of the said last-mentioned stocks, funds, and securities, and also such part of the residue of my personal estate as shall, at the time of my decease, consist of such stocks, funds, or securities, and to invest the monies to arise by such callings in, sales, transfers, and dispositions, in the names or name of my said trustees or trustee for the time being, upon other stocks, funds, or securities of the like nature, and so to be varied and transposed from time to time as often as occasion shall require. —power to change securities;

48 b^1. I direct my said trustees or trustee, as and when they or he shall think expedient, to convert my residuary personal estate (including chattels real) into money; Short form of trusts for conversion of personal estate;

48 b^2. And after payment of my funeral and testamentary expenses, debts, and legacies, to invest the residue thereof, (and also any legacies or trust-monies not immediately payable or otherwise applicable), in the funds or on mortgage of freehold, customary, or leasehold hereditaments in England or Wales, (and not in Ireland); With power from time to time to vary such investments. —investment; —change of investments;

48 b^3. Provided always, that it shall be lawful for my said trustees or trustee, in their or his absolute discretion, to allow, pay, compromise, compound, enforce, waive, accept, or give real or personal security for, or give time without taking any security for, or refer to arbitration, any debts or demands whatsoever which may be owing from or to, or be made upon or against or in behalf of, my estate, whether the same be legally enforceable or not, and upon such evidence as they or he shall think sufficient. —power to compromise claims, &c.;

—to continue testator's investments;

48 b^4. And to continue, for such time as they or he shall think fit, any part or parts of my personal estate in or upon such investments or personal or other securities as shall be subsisting at my decease; [And to apply the actual income therefrom in manner herein directed concerning the income from other investments;] And to suspend for such time as they or he shall think fit the conversion of any leaseholds or any reversionary or other property not yielding income.

—application of actual income;

—to suspend conversion of leaseholds and reversions.

Residuary bequest to trustees;

48 c^1. And I give and bequeath unto the said [*trustees*], their heirs, executors, administrators, and assigns respectively, all my ready money, securities for money, goods, chattels, credits, and personal estate and effects, whatsoever and wheresoever, and of whatsoever nature or kind soever, not hereinbefore specifically bequeathed, and also all the personal estate over which I have a disposing power, including therein leaseholds and chattels real, and also all estates vested in me as mortgagee; To hold the same unto the said [*trustees*], their heirs, executors, administrators and assigns respectively, upon the trusts following, namely:—

—trust for sale and conversion of residuary personalty;

48 c^2. Upon trust, as soon as conveniently may be after my decease, in the discretion and of the absolute authority of my said trustees or trustee for the time being, to sell and dispose of, collect, get in, and convert into money so much and such parts of the same residuary personal estate as shall not consist of money or of such securities for or investments of money yielding income as my said trustees or trustee shall think fit to continue for any time (other than personal securities, which, subject to the discretionary power hereinafter contained, I intend shall be called in).

—power to compound debts, settle claims, refer to arbitration, &c.;

48 c^3. And I authorise and empower my said trustees or trustee for the time being to waive, suspend, or release, or make any composition or arrangement for or concerning any debt or debts, demand or demands, which may be due to me at the time of my decease or be claimed on behalf of my estate; and to take any security on real or personal property, or any bond, note, or engagement for the payment or satisfaction of any such debt or debts, demand or demands, or the sum or sums to be accepted or taken by way of composition for the same; and to allow such time for the payment of any such debt or debts, sum or sums, as they or he shall think proper; and also to pay or satisfy any debt or debts, demand or demands, which may be claimed to be owing from me or be made against my estate, upon such title or evidence, whether strictly legal or not, as my said trustees or trustee

shall deem satisfactory; And also to adjust and wind up any accounts pending between me and any other person or persons whomsoever, and give full and complete acquittances and discharges in relation thereto; and to refer to arbitration, upon such terms and conditions as they or he shall deem expedient, any disputes which may be pending or may arise with any person or persons with whom I in my lifetime shall have had, or my said executors, trustees or trustee, after my decease, shall have any dealings or transactions, or any other disputes whatever relating to my estate or effects, or any part thereof, or the administration of the trusts of my will; And at their or his discretion to abide by or contest and dispute any submission or arrangement which may have been made or entered into as aforesaid, or any award or other matter or proceeding consequential thereon, (*or, substitute the following more concise clause*),

48 *c*[4]. [AND I AUTHORISE AND EMPOWER my said trustees or trustee in their or his absolute discretion to pay, satisfy, arrange, compound, or take security for, release, waive, suspend, or refer to arbitration any sums of money, rents, debts, accounts, claims, and demands whatsoever, which may be owing to or from, or be claimed or made on behalf of or from or against my real or personal estate, in such manner and upon such evidence as they or he shall think fit, whether the same be legally enforceable or not.] —[power to compound debts, &c.; (*Shorter form*);]

48 *c*[5]. AND I FURTHER EMPOWER my said trustees or trustee for the time being to sell any part of my residuary personal estate which shall be saleable under the trust hereinbefore contained upon credit. —power to sell on credit;

48 *c*[6]. AND I HEREBY DECLARE that my said trustees or trustee shall stand possessed of the monies to arise and be produced from my residuary personal estate as aforesaid, or of which the same shall or may happen to be composed at the time of my decease, —trusts of proceeds of residuary personalty,

48 *c*[7]. UPON TRUST thereout, in the first place, to pay or retain all the expenses incident to the execution of the preceding trusts and powers, also my funeral and testamentary expenses and debts; And, in the next place, to pay or appropriate funds for the payment or satisfaction of the legacies given by my will or any codicil thereto; —to pay expenses, debts, legacies, and annuities;

48 *c*[8]. AND UPON FURTHER TRUST to invest the ultimate surplus of the said trust-monies in the names or name of my said trustees or trustee, in or upon permanent public stocks or —investment of ultimate surplus;

funds of the United Kingdom, or on the security of a mortgage or mortgages of any freehold or copyhold [or leasehold] estates in England or Wales, [and not elsewhere.]

—power to change securities;

48 *c*[9]. PROVIDED ALSO, AND I HEREBY DECLARE, that it shall be lawful for my said trustees or trustee for the time being at any time or times to sell, transfer, and dispose of all or any of the stocks or funds, and to call in the securities which for the time being shall be vested in them or him upon any of the trusts aforesaid, or any part thereof, and to lay out and invest the monies to arise therefrom in the names or name of the said trustees or trustee, in the public stocks or funds of Great Britain, or on mortgage of freehold, copyhold, or leasehold estates (*a*), or other real securities in England or

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As to extending the trust for investment to leaseholds and to real securities out of England.

(*a*) This trust expresses what is sometimes matter of doubt; namely, whether trustees ought to lend money on leasehold securities, and, if so, what length of term should be considered sufficient. The absolute exclusion of leasehold mortgages is clearly impolitic, as it may preclude the opportunity of an advantageous investment. [Where investment is not restricted in the ordinary manner to real securities in "England or Wales," trustees may lay out money on an Irish mortgage. The following observations were published, it will be remembered, in 1834. Subsequent experience has given a different aspect to Irish mortgage securities.] Having regard to the improved and still progressive condition of Irish agriculture, and the consequent increase in value of lands in that country, and the high rate of interest allowed by law, to say nothing of the additional protection, derivable, in the opinion of some at least, from the system of registration, it deserves consideration, whether the continuance of the local restriction in question is advisable, and whether it ought not, now that good securities are difficult to be obtained at all, to be left to the discretion of trustees to invest on an eligible security offered in any part of the United Kingdom, in reliance upon their exercising all the additional vigilance, which remoteness of locality, or other circumstances, may require.

Stat. 4 & 5 Will. 4, c. 29, as to investments on real securities in Ireland.

The editor perceives, since writing the preceding observations, that the recommended extension of the trust for investment has been, to a considerable extent, effected by the legislature, an act having passed in the last session of Parliament (4 & 5 Will. 4, c. 29), empowering trustees, who are authorised or directed to lend money at interest on real securities in England, Wales, or Great Britain, to lend the same on real securities in Ireland, with the requisition only, that, in case any minor or unborn child or lunatic shall be interested, the loan be made under the direction of a court of equity in England, to be obtained upon petition in a summary way. Courts of equity in England are enabled to make the same orders and decrees for the payment of monies lent by trustees or public bodies under the authority of this act, as if the lands had been situate in England; and process against the lands or parties may be obtained from the Court of Chancery or Exchequer in Ireland, on an inrolment being made of a copy of the decree or order of the

Wales, [or in Ireland,] to be from time to time in like manner altered and varied when and as often as occasion shall require. [And I do hereby direct, that my said trustees and trustee for the time being shall stand possessed of and interested in all such new or other stocks, funds, and securities as aforesaid, and the annual produce and income to arise therefrom, upon the same trusts and for the same intents and purposes as are hereinbefore by me declared concerning the trust premises in lieu of which the same shall be so substituted as aforesaid and the annual produce and income thereof, or as near thereto as the deaths of the parties and other circumstances will permit (*a*).]

48 *c*[10]. And upon further trust, that my said trustees and trustee shall stand possessed of and interested in the said residue of my personal estate, and the stocks, funds, and securities of which the same shall consist, or in or upon which the same shall from time to time be invested, and the annual produce and income thereof, Upon the trusts and for the intents and purposes hereinafter expressed concerning the same, (that is to say), [*Ulterior trusts.*]

—trustees to stand possessed of securities upon trust, &c.

48 *d*. And I hereby declare, that my said trustees or trustee for the time being shall, from time to time, during the continuance of the trusts upon which they shall hold any specific or residuary monies or funds under my will, of their or his own authority, lay out and invest the said trust-monies respectively, or so much thereof as shall from time to time be collected, got in, or possessed by them or him, at interest, either in or upon any of the stocks or funds of Great Britain, or upon real securities in England or Wales; And also shall and may, from time to time, of their or his own authority, alter, vary, and change the securities in or upon which the said

Power to make investments and change securities. (*Applicable to specific funds as well as to the residuary estate.*)

English court; and the Irish court is empowered to make orders consequent on such process. This enactment, though it certainly diminishes, does not wholly supersede, the necessity of extending trusts for investment to real securities in Ireland, as recommended in the present note, since the preliminary step directed by the act, namely, the obtaining an order of an English court of equity, would be attended with some trouble and expense; though it is to be remembered, that the facilities afforded by the act, in regard to the issuing of process against the lands or person of the mortgage debtor, are only to be obtained where the loan is made under the authority and in compliance with the requisitions of the statute. It is now necessary that a testator or settlor who means to prevent his trustees from lending money on Irish real securities should expressly prohibit their doing so.

(*a*) This is a usual but superfluous appendage to the clause.

trust-monies respectively shall from time to time be invested under the power aforesaid, or in or upon which any part of my personal estate shall be invested at the time of my decease, as my said trustees or trustee for the time being shall deem proper; And shall stand possessed of and interested in the said several trust-monies, stocks, funds, and securities, and the annual produce and income thereof, Upon the several trusts and subject to the several powers and declarations herein expressed concerning the same respectively; And as to the produce of my residuary personal estate, (*Ulterior trusts*).

Trust to invest in purchase of lands to be settled to uses of will;

48 *e* [1]. Upon trust, after payment and satisfaction thereout of my funeral and testamentary expenses, and the debts owing by me at the time of my decease, and the charges and expenses attending the execution of the trusts of this my will, and the legacies bequeathed by my will or any codicil thereto, to lay out and invest the clear monies arising therefrom in the purchase of freehold or copyhold lands or other hereditaments held for an estate of inheritance in fee simple, to be situate in England or Wales. And I direct and declare, that the hereditaments so to be purchased as aforesaid, shall be conveyed and assured to my said trustees or trustee for the time being, upon the trusts and for the intents and purposes in this my will expressed concerning the real estates hereby devised, or upon and for such of the same trusts, intents, and purposes as shall be then subsisting or capable of taking effect; And in the meantime, until the said trust-monies shall be so laid out, the same shall be invested by my said trustees or trustee for the time being in the purchase of Consolidated Three Pounds per Centum Annuities, or Reduced Three Pounds per Centum Annuities, or Exchequer Bills, (the same to be varied from time to time as often as my said trustees or trustee for the time being shall deem expedient).

—in the meantime to be invested;

—income from investments to be applied as rents.

48 *e* [2]. And I direct and declare, that the dividends and annual produce arising from the said funds and securities shall go and be applied in such and the same manner in all respects as the rents and profits of the hereditaments to be purchased with the said trust-monies would have gone and been applicable, if the same had been actually purchased pursuant to the trusts aforesaid.

Residue for conversion;

—proceeds to be disposed of in manner directed concerning proceeds of realty.

48 *f*. I give and bequeath all the residue of my personal estate and effects whatsoever and wheresoever, and of what nature and kind soever, which shall remain after payment of my funeral and testamentary expenses and debts, and the legacies bequeathed by my will or any codicil thereto, unto

the said [*trustees*], their executors, administrators, and assigns, UPON TRUST, that they, or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my residuary estate, will or shall, as soon as conveniently may be after my decease, sell, dispose of, call in, and convert into money, all such parts of my residuary personal estate, not hereinbefore effectually bequeathed, as shall not consist of ready money; AND will or shall stand possessed of the monies to arise thereby, and of such part of my said residuary personal estate as shall consist of ready money, UPON SUCH TRUSTS, and for such intents and purposes, and under and subject to such powers, provisoes, and declarations, as the same would have been subject to if the same had been money produced by sale of any part of the said manors, hereditaments, and premises made under or by virtue of the power of sale hereinbefore contained. (*Add* (48 b^3)).

Power to vary investments. (*Applicable to any trust-funds under the will*).

48 *g*. PROVIDED ALSO AND I FURTHER DECLARE, that it shall be lawful for my said trustees or trustee for the time being, at any time, or from time to time, [with the consent in writing of my said wife during her widowhood, and, after her decease or re-marriage, then in the discretion of my said trustees or trustee,] to sell and dispose of any stocks, funds, or securities, whereon any of my trust-monies for the time being shall or may happen to be invested, and to invest the money to arise from such sale in any other of the public stocks or funds, or on mortgage of freehold, copyhold, or leasehold estates in England or Wales, and to vary or transfer the same as occasion shall require, or as shall be thought fit.

Short general declaration as to investments;

—power to vary investments;

—general direction as to consent.

48 *h*. I DIRECT that all trust-monies not immediately payable or otherwise applicable, shall be invested by my trustees or trustee; And that all investments of trust-monies to be made by my trustees or trustee shall be made in their or his names or name, in the public stocks or funds, or on real securities in England or Wales, (and not in Ireland). I AUTHORISE my trustees or trustee from time to time to vary any investments of trust-monies; BUT, as to investments whereof the income or any aliquot part of such income exceeding one-sixth shall for the time being be payable to any adult person or persons, not without the consent in writing of such person or persons.

Trust for conversion of residue; (*Concise form*);

48 *i*. I GIVE AND BEQUEATH all the personal estate and effects whatsoever and wheresoever, not by me specifically bequeathed, of or to which I shall be possessed or entitled at

the time of my decease, unto the said [*trustees*], their executors, administrators, and assigns, UPON TRUST, as soon as conveniently may be after my decease, to collect, get in, and convert into money my said residuary personal estate, or such part thereof as shall not consist of money or such investments as are hereinafter authorised to be made; (*Power to settle claims, &c.*, (48 *m*[2])): And with the monies produced by or forming part of my residuary personal estate, to pay my funeral and testamentary expenses and debts, and the legacies given by my will or any codicil; And to lay out and invest all the surplus of the said monies respectively, in their or his names or name, in the public stocks or funds of Great Britain, or at interest upon real securities in England; And which stocks, funds, and securities, and also any such of which I shall be possessed at my decease, I empower the said trustees and trustee from time to time to alter, vary, and transpose, as occasion shall require, or as they or he shall think fit; And to stand and be possessed of and interested in all the said trust-monies, stocks, funds, and securities, and the annual produce and income thereof, upon the trusts hereinafter expressed concerning the same, (that is to say),

—to pay debts and legacies,

and invest residue in the funds or on real securities,

and stand possessed thereof on trusts.

Power to vary investment of specific fund (*a*).

48 *k*. PROVIDED ALSO, that it shall be lawful for my said trustees or trustee, at any time or times, with the consent in writing of the said [*husband*] and [*daughter*], or the survivor of them, and after the decease of such survivor, then at the discretion of my said trustees or trustee, to sell and dispose of the said sum of £—— Consolidated Three Pounds per Centum Annuities, and to invest the money arising from such sale in any other of the public stocks or funds of Great Britain, or on mortgage of freehold, copyhold, or leasehold estates in England or Wales; And, from time to time, with such consent or at such discretion as aforesaid, to vary and change such stocks, funds, and securities, as often as shall be thought fit. [And that, upon every such variation or transfer of the said trust-funds and securities as aforesaid, or otherwise, any person or persons who shall pay any money to the said trustees or trustee for the time being, shall be exempt from all responsibility in respect of the application thereof (*b*).]

(*a*) [Some clauses not relating to residuary gifts are inserted here, in order that clauses of the like nature may be as much as possible kept together.]

(*b*) [This last clause is inserted, where, the residue being given to a person sui juris, there are no general clauses relating to the powers of the trustees.]

48 *l*[1]. WHEREAS, by an instrument in writing under my hand and seal, dated the —— day of ——, I have appointed [*Indian executors*], my executors as to such part of my personal estate as, at the time of my decease, shall be in India; AND I have likewise devised and bequeathed unto the said [*Indian executors*], their heirs, executors, administrators, and assigns respectively, All my real and personal estate in India, IN TRUST as to my house situate in ——, in Calcutta, for [*name*], and her assigns, during her life; And as to all the residue of my said real and personal estate, and as to the said house, from and after the decease of the said [*name*], UPON TRUST, absolutely to sell all my said real estate, and collect and get in and take possession of all my personal estate, and out of the monies which shall so come to their or his hands, to invest upon such security in India or elsewhere, as to them or him shall seem fit, a sum, the interest whereof will produce the sum of —— Sicca rupees per calendar month, and the additional sum of —— like rupees per annum; With power to alter and vary the said securities as to them or him shall seem fit, and to pay the said monthly and annual sums to the said [*name*], during her life, for her separate use, independently of any husband, and without power in her to anticipate; And to hold the residue of the said monies (and on the decease of the said [*name*], the monies so invested), Upon such trusts and subject to such directions as shall be transmitted to them by any trustees or trustee for the time being of that part of my estate which is situated in Europe, and, in default of any such direction, upon the trusts declared or to be declared by my will of that part of my estate which is situated in Europe. AND in the instrument now in recital is contained a proviso, that in case either or both of them the said [*Indian executors*] should have departed this life, or have ceased to reside in India, at the time of my decease, then the senior partner or the two senior partners for the time being in the house or firm of [*firm*], in Calcutta, shall be substituted as my executor or executors and devisee or devisees, trustee or trustees, in his or their place or places (as the case may be). NOW I DO HEREBY CONFIRM the said instrument and every part thereof, and I do hereby revoke all other wills, codicils, and other testamentary writings made by me at any time or times heretofore. (*Appointment of executors and trustees*, (3*f*); *Specific and pecuniary legacies; Bequest of residue to trustees*, (48 *a*[1])).

Recital of appointment of executors in India, and bequest of property there to them in trust, as to house for A. B. for life;

—to convert residue;

—to set apart fund for annuity for A. B. for life;

—to transmit residue to English executors;

—confirmation of Indian will;

48 *l*[2]. AND I HEREBY DIRECT, that my trustees shall stand —trustees to

be possessed of residue;

possessed of all my personal estate, of what kind soever, not hereinbefore specifically bequeathed (including therein all such sums as shall be remitted to them from India), UPON THE TRUSTS following (that is to say), As to my plate, jewels, books, maps, pictures, and prints, in trust for my said wife during her life, and, after her decease, upon the trusts hereinafter by me declared of my residuary personal estate, (that is to say), UPON TRUST, either to suffer such parts of my personal estate as shall consist of India Stock, money in the English or any foreign funds, or securities for money, to remain in their then actual state of investment, or to convert the same or any part thereof into money; And to sell and convert into money such part of my said personal estate (including therein all leaseholds and chattels real), as shall not consist of India Stock, money in the English or any foreign funds, or securities for money, which they or he shall think fit to retain on the existing securities thereof; (*Power to compound debts, &c.*, (48 *c*[3])); AND I DIRECT AND DECLARE that my said trustees or trustee for the time being shall stand and be possessed of the monies to arise from such sale or conversion, and of the monies of which I shall be possessed at the time of my decease, and the monies which they shall receive from my executors and trustees in India, under the trusts of the hereinbefore recited instrument, (*in trust to pay debts and legacies, and to invest surplus, &c.*, (48 *c*[7]) *to* (48 *c*[10])).

—as to plate, trinkets, &c., for wife for life;

—conversion; power to retain Indian and other investments.

Short direction as to conversion of personalty, farming stock, &c.

48 *m*[1]. I AUTHORISE my said trustees or trustee to convert into money my growing crops, farming stock, and residuary personal estate, at such times and in such manner as they or he shall think fit;

—discretionary power to compound debts, &c.;

48 *m*[2]. With full discretionary power to admit, waive, suspend, compromise, take or give personal or other security for, allow, or refer to arbitration, any debt or claim which may be owing to or from or be made on behalf of or against my estate, whether legally enforceable or not; And to sell any part of the said trust property upon credit.

—to sell on credit.

Power to testator's partner to wind up partnership affairs without interference of executors.

48 *n*. AND I EMPOWER my said son, [*name*], to receive the credits of our said partnership firm, and in his uncontrolled discretion to settle, adjust, and wind up the accounts and transactions thereof, without any interference on the part of my executors hereinbefore named; AND I EMPOWER my said son to adjust, settle, waive, suspend, take personal or other security for or compound any accounts, claims, and demands whatever, in respect of, or which may be made by or on

behalf of or against, the said partnership, and that upon such evidence, whether strictly legal or not, as he shall deem sufficient; And I direct that my said son, [*name*], after paying or providing for the debts owing by the said partnership firm, shall from time to time account for and pay over to my executors, my part or share in the net or clear proceeds of the credits received by him as aforesaid.

Power to suspend conversion of foreign government securities;

48 *o*. And whereas it is probable, that, at the time of my decease, some part of my personal property may be invested upon foreign government securities, and it may be inexpedient immediately to sell and convert the same, I therefore authorise and empower my trustees or trustee for the time being to suspend the execution of the trusts for sale and conversion hereinbefore contained in regard to such investment, so long as they or he shall think proper. And I direct, that the income arising from such part of my personal estate as shall from time to time remain unsold and unconverted, shall, from the day of my decease, go and be applied to such person or persons, and for such purposes, as the income arising from the securities to be purchased with the proceeds thereof would have gone and been applicable under the trusts aforesaid.

—actual income to be applicable as such.

Power to executors to continue loan to testator's son-in-law;

48 *p*. And whereas my said son-in-law, [*name*], is indebted to me in the sum of £——, for which I hold his bond, dated the —— day of ——, Now, I hereby authorise and empower my trustees or trustee for the time being, in their or his discretion, to defer and postpone the calling in of such bond debt or any other debt which may be owing to me from the said [*son-in-law*] at the time of my decease, for such period as my said trustees or trustee shall think proper. Provided, that no part of my furniture, linen, plate, china, jewels, trinkets, books, pictures, horses, carriages, and other chattels of a like nature, shall be sold during the life of my wife, [*name*], without her consent, unless such sale shall be required, in aid of the produce of the other parts of my personal estate and of my real estate, for the payment of my funeral, testamentary, and trust expenses, debts, and legacies.

—furniture, &c. not to be sold without consent of wife.

Authority to delay conversion;

48 *q*. And I further empower my said trustees or trustee for the time being, in their or his discretion, to postpone or delay the sale or conversion of any part or parts of my residuary personal estate hereinbefore directed to be sold and converted; And I direct, that, in the meantime, the income arising from the property so remaining unsold or unconverted,

—destination of the income

in the meantime.

shall, from the period of my decease, belong to and be received by the person or persons who would be entitled, under the trusts hereinafter contained, to the annual produce and income of the investment which would or ought to have been made of the monies arising from such sale and conversion, if the same had actually taken place.

Power to trustees to invest trust-monies in the purchase of freeholds, copyholds, or leaseholds;

48 *r* [1]. PROVIDED ALSO, AND I HEREBY DECLARE, that [if at any time or times hereafter during the continuance of any of the trusts hereinbefore contained, it shall appear to my said trustees or trustee for the time being to be expedient to invest any part of the said trust-monies in such purchase or purchases as is or are hereinafter mentioned], IT SHALL BE LAWFUL for my said trustees or trustee, in their or his absolute discretion, at any time or times to sell and dispose of any stocks, funds, and securities whereon the said trust-monies shall for the time being be invested; And to lay out and invest the money to arise from the sale or disposition thereof in the purchase of any freehold, copyhold or customary or leasehold messuages, lands, tenements, or hereditaments, in England or Wales (so that the leaseholds be held for an absolute term of which not less than sixty years shall be then unexpired, or by lease containing a covenant to renew for such a term at least), with

—to purchase, subject to special conditions, &c.

power to purchase subject to any special stipulations, and to complete or accept any contract or title though not strictly enforceable or marketable, and to waive any objections or requisitions; And to cause the same when so purchased to be conveyed and assured unto and to the use of my said trustees or trustee, their or his heirs, executors, administrators, and assigns respectively, according to the nature and quality thereof

—power to sell again;

respectively; To be held by them or him UPON TRUST, at any time or times, in the discretion and of the absolute authority of my said trustees or trustee for the time being, to make sale and absolutely dispose of the same messuages, lands, tenements, and hereditaments, either together or in parcels, and either by public auction or private contract, and subject or not, at the absolute discretion of my said trustees or trustee, to any special conditions or stipulations as to title, evidence of title, expense, compensation, arbitration, indemnity, postponement of payment of and security for purchase-money, or otherwise, with power for my said trustees or trustee to buy in any hereditaments at any auction or auctions, or to rescind, abandon, or vary any contract for sale, And to resell any hereditaments bought in or as to which any contract shall be rescinded or

abandoned, without being answerable for any loss occasioned thereby; And the said hereditaments to convey or assign, or cause to be conveyed or assigned when sold, to the purchaser or purchasers thereof, or as he, she, or they shall direct, And to receive the purchase-money for the same; And, at such discretion as aforesaid, to lay out the money so to be received in the names or name of my said trustees or trustee in or upon the public stocks or funds, or upon mortgage or in the purchase of any such hereditaments as are hereinbefore authorised to be purchased; With power to vary and transpose the same investments or any of them as often as shall be thought expedient.

48 *r* [2]. And I hereby declare, that my said trustees or trustee for the time being respectively shall hold the said messuages, lands, tenements, and hereditaments so to be purchased, and the rents, issues, and profits thereof, in the mean-time until the sale thereof, and the money to arise from such sale, and the stocks, funds, or securities whereon the same shall be invested, and the annual produce and income thereof, upon and subject to such of the several trusts, provisoes and directions hereinbefore expressed and contained concerning the said trust-monies, stocks, funds, and securities out of the proceeds or produce whereof such purchase or purchases shall be made as aforesaid and the annual produce and income thereof as shall be then subsisting or capable of taking effect.

—trustees to hold purchased lands upon trusts before declared;

48 *r* [3]. And I further declare, that the messuages, lands, tenements, and hereditaments to be so purchased as aforesaid, shall, from and immediately after such purchase or purchases shall be made, be considered for all the purposes of my will as personal estate, and be transmitted accordingly, though no actual conversion thereof into money shall have taken place.

—purchased lands to be treated as personalty;

48 *r* [4]. Provided also, and I further declare, that in case any messuages, lands, tenements, or hereditaments to be purchased as aforesaid should be held by renewable lease or leases for lives or for years, the fines, fees, and expenses of any renewal of the same shall be defrayed out of the rents and annual produce and income of the hereditaments comprised in such renewed lease or leases.

—expenses of renewals.

48 *s* [1]. I authorise the respective trustees or trustee for the time being of the said several sums of £—— and £——, hereinbefore bequeathed in trust for my said daughters, [*names*],

Special trusts for investment of two legacies on securities in

Australia, &c., or in railway securities, &c.;

and their children respectively, or of any part or parts of such respective sums (*a*), at any time or times, at their or his discretion, (but, during the life of my said daughter, [*name*], with her consent in writing as to the first mentioned sum of £—— or any part thereof, and during the life of my said daughter, [*name*], with her consent in writing, as to the said sum of £——, or any part thereof), to invest the sum or sums whereof they or he shall be trustees or trustee, or any part thereof, upon any of the permanent public stocks or funds of Great Britain, or in Bank stock, or upon real securities in England, Wales, or her Majesty's colony of Western Australia, or upon debentures or mortgages of any such canal, railway, or dock company or companies or other similar company or companies in Great Britain or Ireland as such trustees or trustee shall think well established and sound, or in the paid up shares or joint stock of any such company or companies paying a dividend; With power, from time to time, with such consent or at such discretion as aforesaid, to vary any such investments.

—power to appoint separate trustees in respect of investments in Australia.

48 *s*[2]. And I authorise the trustees or trustee for the time being of either of the said sums of £—— and £——, or any part or parts thereof respectively, or in case of the death or incompetency by absence from England and Wales, or from Western Australia, (should a trustee or trustees of any such trust-funds resident there have been appointed), or by any other cause, of any such trustee, then the competent or acting trustees or trustee, or any executor or administrator of the trustee who shall have last died in his office, from time to time, with the consent of such one of my said daughters as shall be interested in such trust-funds, (if living), to appoint a person or persons resident in Western Australia, or elsewhere, to be a trustee or trustees of the said respective sums, or of any part or parts thereof, and the securities for the same, separately from the other trust property under my will, either in the room of the trustees or trustee existing before such appointment, or jointly with any such trustees or trustee; And with all such powers and authorities in respect of the trust-funds whereof he or they shall be appointed trustee or trustees as are herein given to the trustees hereby appointed (*b*).

(*a*) [See the annexed power of appointing special trustees in respect of funds invested in Australia.]

(*b*) [The introduction of the special power will not, of course, supersede the necessity for a power to appoint trustees of the general estate, which will be in the usual form.]

48 t^1. I AUTHORISE my trustees or trustee, in their, his, or her absolute discretion, to allow the sum of —— East India Company's rupees, which I now have in the hands of the government agent in India at interest, to remain upon such investment for such time as they, he, or she shall think fit; AND ALSO to invest all or any part of the produce of my residuary real and personal estates in India upon the like security, or upon any other public or Government or real securities in India; And from time to time to vary such investments for others of the like nature, or for such investments in Great Britain as are hereinbefore authorised. Authority to retain, make, and vary investments in India;

48 t^2. I FURTHER AUTHORISE my said trustees or trustee, in their, his, or her discretion, to employ [*names*], merchants and agents of Calcutta, or either of them, or such other persons or person as my trustees or trustee shall think fit, as their, his, or her agents or agent in India, for the purpose of realising, collecting, investing, managing, receiving, and transmitting my said residuary estate and effects in India, and the income and produce thereof, with the usual commission or allowance, and with such general, discretionary, or other powers and authorities, as to the choice of investments or otherwise, and subject to such restrictions, rules, and directions, as my said trustees or trustee may think fit, without being in any way responsible for the acts, defaults, or misconduct of such agents or agent, other than such acts as shall be done in obedience to the express direction of my said trustees or trustee to do or commit some act or default which, if done or committed personally by such trustees or trustee, would amount to a breach of trust; It being my intention that my said trustees or trustee may delegate all or any of their discretionary or other powers and duties in respect of my property in India to such persons or person as they, he, or she shall think fit, without being responsible for the consequences of such delegation. —authority to employ agents, and to delegate discretionary powers; —trustees not to be answerable for agents.

DIRECTIONS FOR CARRYING ON TESTATOR'S BUSINESS (*a*).

49 a^1. I GIVE AND BEQUEATH all the residue of my real and personal estate not herein otherwise effectually disposed of, Residuary devise and bequest to trustees;

(*a*) [For directions respecting farming business, see forms under the head "MIXED RESIDUE."]

unto my said trustees, their heirs, executors, administrators, and assigns respectively, IN TRUST for such of my said sons, [*names*], and my said daughters, [*names*], as shall survive me or leave issue surviving me, and their, his, or her heirs, executors, administrators, and assigns respectively, in equal shares and proportions; And as to the share of each of my said daughters, IN TRUST for her sole and separate use during any coverture.

—authority to trustees to carry on trade for —— years;

49 a^2. PROVIDED ALWAYS, that it shall be lawful for my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, to continue and carry on for the term of —— years from the time of my decease the business of a ——, lately carried on by my deceased husband, and since carried on with part of his assets by myself and my said son, [*name*], and to employ therein the whole of my personal estate remaining after satisfaction and payment of my debts and of the legacies and bequests given by my will or any codicil thereto; WITH FULL POWER for my said trustees or trustee to manage the same in all respects at their or his discretion, without being subject in any manner to the interference or control of any person interested in my residuary estate or in any part thereof, and without being liable, before the expiration of the said term of —— years, to account for any part of the capital or profits thereof to my said daughters, or either of them, their or her executors or administrators, except only to the extent of £—— per annum, in respect of each daughter's one —— part or share of the annual profits arising from my residuary estate or from so much thereof as shall be employed in the said business, or such less sum as the annual profits of such share shall amount to; And, after the expiration of the said —— years, or sooner, with the consent in writing of my said daughters or the survivor of them, whether then of age or not, it shall be lawful for my said sons, jointly, or, on the refusal or neglect of either of them for the space of two calendar months after being thereto requested in writing by the other of them, for such other, or for the survivor of them, to purchase the shares and interests in the stock and capital of the said business hereinbefore bequeathed to my said daughters as aforesaid, at the amount or value thereof; SUCH amount or value to be ascertained by two valuers or their umpires, one of the said valuers to be appointed by my said trustees or trustee, and the other to be appointed by my said daughters or surviving daughter, or the executors or administrators of such

—before expiration of —— years, trustees not to be bound to pay more than £—— out of profits in respect of each daughter's share;

—after —— years, sons may purchase trade.

survivor, in which valuation the goodwill is not to be considered; SUBJECT to the carrying on of the said business, and the trusts aforesaid. (*Power to get in residue, &c.* (48 *b* [1], *&c.*)).

49 *b* [1]. AND WHEREAS I now carry on the trade or business of a ——, in partnership with [*partners*], under the firm of [*firm*], and such partnership is to endure for —— years, from the —— day of —— last, but determinable nevertheless at my own pleasure. AND the whole of the capital employed in the said business belongs to me, and the said [*partner*] receives a certain share of the profits arising therefrom. AND the said [*other partner*], who is only a nominal partner, receives in lieu of profits a salary of —— per annum. AND it may happen, that, at the time of my decease, I may continue to be engaged in the said partnership, or may carry on trade or business either alone or in copartnership with some other person or persons.

Recital that testator is in trade in partnership;

—of interests of partners;

49 *b* [2]. NOW, THEREFORE, I DO HEREBY AUTHORISE AND EMPOWER my said trustees or trustee for the time being, either to carry on or join in carrying on my said business, until some one of my said sons shall attain the age of twenty-one years and be desirous to take thereto, or all my sons shall die under that age or refuse to take thereto on attaining that age, or to discontinue the same, as to them or him shall seem prudent; AND, if they or he should think proper, upon the expiration of the term for the time being in any such copartnership as aforesaid, to renew such copartnership for such further terms or term, not extending beyond the period during which I have authorised them or him to carry on the said business, as to my said trustees or trustee shall seem expedient; AND, upon the renewal of any copartnership for such further term or terms, to increase, if they or he shall think fit, the share therein of the said [*one of the partners*] to one equal third part or share of the profits thereof, or even to one moiety or equal half part of the same; AND, during the continuance of any such term which may be in existence at the time of my decease, or during such renewed or further term or terms, to continue, if they or he shall think fit, the said salary of £—— per annum, or to give any other salary to the said [*other partner*], or to take any other assistant in the said business, at such salary as they or he shall think proper; AND to employ in the said business all the capital which may be invested therein at the time of my decease;

—discretionary power to trustees to carry on trade;

—to renew partnership;

—to increase share or salary of any partner;

—to employ all capital employ-

—ed at testator's death;

and all arrears of profits then belonging to me and left in the said business, and the growing profits thereof which shall fall to my share after paying all the expenses of carrying on the same, including the salary aforesaid, or to withdraw from the said business and from the said profits arising therefrom any sum or sums which they or he shall think proper, and apply the same at once upon the trusts hereinafter declared of my said business and the capital and profits thereof respectively.

—to withdraw capital;

—to employ servants, make contracts, &c.;

49 *b* [3]. And, for the purpose of carrying on the said business, I AUTHORISE AND EMPOWER my said trustees or trustee for the time being to hire and employ such persons and with such salaries as they or he shall think proper, and to enter into such contracts and engagements respecting the said business as they or he shall think reasonable, and to increase or abridge the said business and my capital therein, and to adjust and settle all accounts and transactions relating thereto, in which I shall be, or my estate shall after my decease become, interested; And to compromise, or pay, allow, suspend, waive, and compound any debts, claims, or demands relating to the said business, and which may be owing from or to me, or be claimed or made against or in behalf of my estate, upon such evidence, whether strictly legal or not, as they or he shall deem just, and to refer any disputes concerning the same to arbitration, and to make any sale or sales upon credit, and generally to transact all matters and concerns respecting the said business, and to do or cause to be done all acts and things relative thereto, in the same manner in all respects and as if they or he were solely and absolutely entitled to or interested in the premises: It being my intention to give to my said trustees or trustee full power and authority to carry on my said trade, during the period aforesaid, as to them or him shall seem most advantageous and mostly for the benefit of the persons claiming under my will.

—to compound debts, &c.;

—expenses to come out of capital;

—destination of profits;

—to pay debts and legacies;

49 *b* [4]. And I HEREBY DECLARE that all losses, charges, and expenses of and incident to carrying on my said business, shall be primarily borne, paid, and defrayed out of my said capital therein and the profits thereof; And that all gains, profits, and increase of my said business shall belong, go, and be considered, in all respects, as part of the fund hereinafter by me provided for the payment of my debts, funeral and testamentary expenses, and the legacies, annuities, and annual allowances by my will or any codicil thereto given or directed to be paid, and shall be paid and applied accordingly, includ-

ing the residuary disposition hereinbefore by me made of such fund.

49 *b*[5]. PROVIDED ALWAYS, AND I HEREBY DIRECT, that my said trustees or trustee shall put and place such one of my sons as shall first or alone attain the age of twenty-one years, and be desirous to succeed to my said business, (each and every of my sons who shall attain twenty-one taking a successive prior right, according to his priority of birth, to enter into the said business, in case no elder son shall have attained twenty-one and entered the same), into the full and complete possession of my said business and assets, and make over to such son all securities, debts, goods, effects, and premises belonging to or used or employed in carrying on the same, Upon my son, who shall so take to my said business, giving security, to the satisfaction of my said trustees or trustee, for the payment of the sums hereinafter mentioned, at such times and by such instalments as to my said trustees or trustee shall seem proper; (that is to say),

—option to sons successively, at twenty-one, to take to trade;

—on giving security;

49 *b*[6]. [IF the son taking to my said trade should be my eldest or only son for the time being entitled, or who, if such settlement as aforesaid were actually made, would be entitled as tenant for life in possession (subject as aforesaid) to my said real estates, Then the said security to be for the several sums in which the fund hereinbefore by me provided or directed to be raised for payment of my debts, funeral and testamentary expenses, and legacies shall then fall short or be insufficient to answer such of the said debts, funeral and testamentary expenses, and legacies as shall then remain unpaid, with interest thereon at the rate of £5 per cent. per annum; And in case the son taking to my said trade should not be my eldest or only son, entitled as aforesaid, then] the said security to be for the whole amount or value of my capital in the said business at the time of his succeeding thereto, (without regard to the value of the goodwill of the said business), with interest on such amount or value after the rate aforesaid; such amount or value to be settled by two indifferent valuers, one to be appointed by each party, or by the umpire of such valuers; And the monies so to be received from any of my said sons shall go and be held upon the trusts hereinafter by me declared of my capital in the said business.

—[if eldest or only son taking real estates, security to be for amount necessary to make up deficiency of fund for debts and legacies; if younger son], for amount of capital in the trade.

49 *c*[1]. AND I DIRECT, that my said wife shall carry on, manage, and conduct my trade or business of a —— at ——,

Wife to carry on business;

during such period and for such intents and purposes as are hereinafter mentioned; And for the purpose of enabling her to carry on, manage, and conduct the said business, I DIRECT that she shall, during the said period of her carrying on the same, have the occupation of the messuage or dwelling-house in which the same shall, at the time of my decease, be carried on (the rent (if any) and taxes payable in respect whereof shall be charged to the account of the business), and the entire use, disposal, and management of all the capital, credits, stock, and effects which shall be employed in or due or owing in respect of my said business at the time of my decease.

—powers of management;

49 c^2. AND I HEREBY AUTHORISE her, for the purpose of carrying on the said business, to hire and employ such persons and with such salaries as she shall think proper; And to enter into such contracts respecting the said business as she shall think reasonable; And to adjust and settle all accounts and transactions relating thereto on which I shall be, or my estate after my decease shall become, interested; And to compromise or compound any debts, claims, or demands relating to the said business, and which may be owing from or to me, or be claimed or made against or on behalf of my said estate; And generally to transact all matters and concerns respecting the said business; And to do, or cause to be done, all acts and things relating thereto, in the same manner in all respects as if she were solely and absolutely entitled to or interested in the premises; Subject, nevertheless, to such powers of interference and control as are hereinafter expressly given to my trustees or trustee.

—wife to carry on business until some son attains twenty-one and takes to it;

49 c^3. AND I DIRECT, that my said wife shall so carry on my said business until my eldest son shall attain the age of twenty-one years, Or, in case of his death under that age, or in case, having attained that age, he should thereupon decline or neglect to take to and carry on the said business, then until some one of my other sons shall first attain the age of twenty-one years, and upon attaining that age shall be desirous to take to and carry on the said business, Or, in case no son of mine should live to attain the age of twenty-one years, and, having attained that age, be desirous to take to and carry on the said business, then until the decease of her my said wife.

—power to trustees to augment or diminish the capital in the trade;

49 c^4. AND I HEREBY AUTHORISE AND EMPOWER my said trustees or trustee for the time being, so long as my said business shall be carried on by my wife as aforesaid, from time to time to augment or diminish the capital employed therein, according to

their or his opinion of the exigencies thereof. AND I DIRECT, that my said trustees or trustee shall be allowed free access to the books and accounts employed in the said business, so long as the same shall be carried on, during the life of my said wife, either by her or by any of my sons as hereinafter provided. —trustees to have access to accounts;

49 *c*[5]. AND I DIRECT, that the clear gains and profits to arise from or to be produced by my said business, during such time as the same shall be carried on by my said wife as aforesaid, shall be paid, applied, and disposed of in manner following; (that is to say), my said wife shall have and be entitled to one moiety of the said gains and profits for her own use and benefit absolutely, and the remaining moiety of the said gains and profits shall be paid and applied for the maintenance, support, and education of all my children for the time being, in such shares and proportions, and in such manner as my said wife shall in her discretion think proper. —one-half part of the gains to be retained by the wife, and the other to be applied to the maintenance of the children at her discretion;

49 *c*[6]. AND I DIRECT, that such one of my sons as shall, within six calendar months next after he shall attain the age of twenty-one years, first signify in writing to my said trustees or trustee his desire to take to and carry on my said business, shall have and be entitled to my said business, and the goodwill thereof, and the capital, credits, stock, and effects then employed in, or due or owing in respect of the same, for his own use and benefit, upon the terms following; (that is to say), —terms on which a son is to take to the business;

49 *c*[7]. I DIRECT, that the messuage in which the said business shall at my decease be carried on, and the capital, credits, stock, and effects of the said business, (exclusively of the goodwill thereof, for which such son is not to be required to give any consideration), shall be valued and appraised by two persons, one of whom shall be chosen by my son so desiring to carry on my said business, and the other by my said trustees or trustee; and in case such two persons should not agree in their valuation and appraisement, then the same shall be valued and appraised by such umpire as the said two referees shall, for that purpose, before or after entering upon such valuation, appoint. —valuation;

49 *c*[8]. AND my son who shall so take to my said business shall thereupon, at his own costs and charges, secure to my said trustees or trustee, by his bond or obligation in a sufficient penalty, such sum of money as the said messuage, capital, credits, stock, and effects of the said business shall amount unto, according to such valuation and appraisement as afore- —value to be secured by son's bond;

said, such sum to be made payable within six calendar months next after the decease of my said wife, without interest for the same in the meantime; Upon which bond so to be given, a memorandum or defeasance shall be indorsed, exempting or exonerating my son so executing the same bond, his heirs, executors, and administrators, from so much of the principal money thereby secured, as, under or by virtue of the trusts hereinafter by me declared of such principal money, shall be the amount of his share thereof. And I direct, that my trustees and executors shall make and execute to my son so taking to my business as aforesaid, at his costs and charges, such assignments and assurances as shall be requisite for effectually vesting in him the said messuage, capital, credits, stock, effects, and premises, and putting him into full and complete possession thereof.

—appropriation of the gains of the business carried on by the son;

49 *c*[9]. And I direct, that in the meantime, after my said son shall take to and carry on my said business until the decease of my said wife, the clear gains and profits of my said business shall from time to time be paid, applied, and disposed of in manner following, (that is to say) two-fifth parts thereof shall belong to and be retained by such son for his own use and benefit absolutely, and the remaining three-fifth parts thereof shall be paid to my said wife, to the intent that the same may be applied by her for the maintenance and support of herself and my children for the time being (except my said son so carrying on my said business), and after the decease of my said wife, the whole of the gains and profits of my said business shall belong to and be the property of my said son so taking to and carrying on the same.

—in case of the decease of wife before any son shall attain twenty-one and consent to carry on the business, then the goodwill, stock, &c. to be sold, and the money to be considered as part of the residue;

49 *c*[10]. Provided always, that in case my said wife should die before any one of my said sons shall attain the age of twenty-one years, or in case not one of my sons should, within six calendar months after attaining that age, signify in writing to my said trustees or trustee his desire to take to and carry on my said business, or in case my wife should be unwilling to carry on and manage the same as hereinbefore directed, then I direct that, from and after the decease of my said wife or her relinquishment of the said business, as the case may be, the goodwill of my said business, and the capital, credits, stock, and effects which shall be then employed in or due or owing in respect of my said business, and the messuage in which the same shall be carried on as aforesaid, shall be forthwith sold, disposed of, and converted into ready money by my said

trustees or trustee, and the money which shall arise by such sale, disposition, and conversion, shall be subject to the trusts hereinafter declared of my residuary personal estate.

49 *c* [11]. And as to the said bond so to be given by my son who shall so carry on my said business as aforesaid, and the principal monies thereby secured, and also as to all the residue of my goods, chattels, and personal estate, of what nature or kind soever, not hereinbefore by me otherwise disposed of, subject to the payment of my debts and funeral and testamentary expenses, I do hereby give and bequeath the same unto my said trustees, their executors and administrators, Upon trust that my said trustees or trustee for the time being shall receive, recover, and get in the principal monies which shall be secured by virtue of the said bond, (With power, nevertheless, if deemed expedient, to continue the loan to my son until the monies shall be wanted for distribution); And also shall, as soon as conveniently may be after my decease, sell, dispose, and convert into ready money all the residue of my personal estate. (*Discretionary powers, trusts for investment, &c.* (48 *c* [3], *&c.*)).

—as to the bond to be given by the son, and all the residue —bequest of the same to trustees to convert the same into money and invest it;

49 *d* [1]. I desire that my wife shall carry on my business of —— during her widowhood, until the same shall be purchased by one of my sons in manner hereinafter mentioned; And, for that purpose, shall have the use and occupancy of such parts of my real and personal estate as may be employed therein at my decease, (the rents and taxes to which any part thereof may be subject being paid out of my personal estate); With full power to manage the same at her discretion, except as to the amount of capital to be employed therein, which I authorise my trustees or trustee to increase out of my residuary estate, or to diminish at their or his discretion. And, if my wife should decline to carry on the said business, or should marry or die before any of my sons shall be able or willing to carry on the business, I authorise my other trustees or trustee either to discontinue or to carry on the same at their or his discretion, either personally or by deputy or deputies under their or his general control, so long as there shall be a son of mine under age. Provided always, that my wife shall be at liberty to carry on my said business during her widowhood, notwithstanding all my sons should die under the age of twenty-one years, or refuse or neglect to purchase the said business.

(*Short form*). Wife to carry on business until a son shall be able and willing to take it;

—to have use of house, &c.;

—power for trustees to regulate amount of capital;

—after death or marriage of wife, trustees to carry on business at their discretion;

—option to sons to purchase, as they may successively come of age; stock, &c., to be valued, and the amount secured by son's bond;

49 *d*[2]. And whichever of my sons shall first, after attaining his age of twenty-one years, by writing under his hand, inform my trustees of his desire to carry on the said business, shall be entitled to the goodwill thereof, and to the premises, capital, stock, credits, and effects employed therein and belonging thereto, (*Add either* (49 *e*[3]) *or* (49 *e*[4])).

49 *d*[3]. Upon securing, at his own costs, by his bond or otherwise to the satisfaction of my trustees or trustee, payment to my trustees or trustee within six calendar months after the decease of my wife, of the value of such premises and effects, exclusive of the goodwill, (which he is to have without consideration), to be ascertained by two valuers or their umpire, one of such valuers to be appointed by such son, and the other by my trustees or trustee; such bond or other security not to carry interest during the life of my wife. I direct, that the amount secured by such bond shall form part of the residue of my personal estate; And that, at the request of such son, my trustees or trustee shall indorse on such bond or security, a memorandum of the satisfaction thereof to the amount of the value of such son's share in my residuary property under my will. I direct, that, so long as the said business shall be carried on by my wife or by my trustees or trustee, the clear profits thereof shall form part of the income of my residuary estate; And while the same shall be carried on by a son of mine, two equal third parts of the clear profits shall, during the life of my wife, be paid to my trustees or trustee, and form part of the income of my residuary estate; and the other third part, and, after the decease of my wife, the whole of such profits shall belong to such son for his own use, in addition to any other benefit given him by my will. I direct, that, so long as my wife shall live, my trustees or trustee shall at all times have free access to and full information concerning the books, vouchers, and accounts of and relating to the said business. (*Or substitute the following clause*).

—profits to form part of general income until a son takes the business, when half is to go to wife, and the residue to that son;

—son to give bond for payment of purchase money within four years;

49 *d*[4]. Upon securing, at his own costs, by his bond or otherwise to the satisfaction of my trustees or trustee, payment within four years from the date of such purchase, or within such other period as my trustees or trustee shall think fit, of the value of such premises and effects, (exclusive of the goodwill, which he is to have without consideration), to be ascertained by two valuers or their umpire, one of such valuers to be appointed by such son, and the other by my trustees or trustee; such bond or other security to carry interest

from the date of such purchase, after the rate of £5 per centum per annum. I DIRECT, that the principal and interest so secured shall be respectively deemed part of the capital and income of my residuary estate, and that, at the request of such son, my trustees or trustee shall indorse on such bond or security a memorandum of the satisfaction thereof to the amount of the value of such son's share in my residuary estate. And that my trustees or trustee may in their or his discretion allow the monies secured by such bond to remain on such security until required for distribution. I DIRECT, that, so long as the said business shall be carried on by my wife or by my trustees or trustee, the clear profits thereof shall be deemed to be part of the income of my residuary estate. I DIRECT, that, so long as my wife shall carry on the said business, my trustees or trustee shall have, at all times, free access to, and full information concerning, the books, vouchers, and accounts relating to the said business.

—interest, secured by bond, to be deemed income of residuary estate;

49 *d*[5]. SUBJECT to the above trusts, I GIVE to my wife the income of my residuary estate, so long as she shall carry on the said business; as to one moiety thereof, for her own use, and, as to the other moiety thereof, for the maintenance and education of my child or children for the time being, in such manner and proportions as she shall think fit. AND, so soon as the same business shall be undertaken by one of my sons as aforesaid or discontinued, I DIRECT my trustees or trustee to transfer my residuary estate unto my wife and such child or children and more remote issue of mine as shall then be living, and shall then be of the age of twenty-one years or married, or shall thereafter attain such age or marry, if more than one, in equal shares; but so as not to include the issue of any issue of mine then living; and so that the child or children of any deceased child or grandchild of mine shall take only such share as his, her, or their parent would have taken if living.

—income of personal estate to wife, while she carries on business, for maintenance of herself and children;

—when business is discontinued or undertaken by son, testator's property to be divided among wife and children, equally;

49 *d*[6]. PROVIDED, that, while my wife shall carry on my trade of ——, and shall remain unmarried, it shall be lawful for my other trustees or trustee, in their or his discretion, to permit her to retain and employ in the said trade any of the aforesaid legacies during the respective minorities or the minority of the persons or person presumptively entitled thereto, she applying towards, or (at the discretion of my other trustees or trustee) paying to my other trustees or trustee

—power to lend the amount of legacies to widow, to be employed in trade.

for, the maintenance and education of such minors or minor, interest on the legacies or legacy so retained after the rate of £5 per centum per annum, to be paid, if demanded, on the 25th day of March and other usual quarter days.

Trust for carrying on trade of a sugar refiner;

49 *e*[1]. I GIVE all my leasehold buildings and hereditaments in —— street and elsewhere, employed by me in my business of a sugar refiner, and all my stock, capital, plant, implements, utensils, and effects employed in the said business, and all the residue of my personal estate not hereinbefore disposed of, unto my said trustees, their executors, administrators, and assigns.

—residue of personal estate to be employed in business;

49 *e*[2]. UPON TRUST, that my trustees or trustee for the time being will, as they or he shall deem expedient, convert into money all such parts of my residuary personal estate as shall not be already employed in my said business, and add the same to the capital of such business; AND that my trustees or trustee will, if they or he shall think fit, carry on and manage the said business at their or his discretion, and for that purpose deal with, sell upon credit, or otherwise convert and employ the said leasehold premises, capital, and other personal estate, and the produce thereof, in such manner in all respects as if they or he were the absolute owners thereof, until the decease or marriage of my wife, or, in case my wife should die or marry during the minority of any son of mine, and no son of mine should be carrying on the said business under the provisions hereinafter contained, then until some son of mine shall attain the age of twenty-one years and agree to carry on the said business, or until there shall cease to be a son of mine under the age of twenty-one years, whichever shall first happen.

—business to be carried on by trustees during wife's life and minority of son;

—trustees may commit business to the management of a son or sons,

49 *e*[3]. PROVIDED, that, in case any son or two sons of mine, being of age, should desire to manage the said business, (the same not being then managed by any other son of mine under this provision), it shall be lawful for my trustees or trustee to permit such son, or the elder of such sons, or (with the consent of the elder of such sons) both of them, thenceforth to manage and carry on the said business, and to exercise all the powers hereinbefore given to my trustees or trustee, But subject, during my wife's life, to the superintendence and control of my trustees or trustee in the same manner and with the same power of dismissal as if such son or sons were

subject to their control;

the agent or agents of my trustees or trustee. PROVIDED, nevertheless, that it shall not be incumbent on my trustees or trustee to exercise any such superintendence or control, or in any manner to inquire into the conduct of the said business by such son or sons.

49 *e*[4]. PROVIDED ALSO, that my trustees or trustee may, at any time or times, withdraw from the said business such part or parts of the capital thereof as they or he shall think fit. —power to diminish capital;

AND, upon the decease of my wife, or upon the discontinuance at any other time of my said business by my trustees or trustee, I EMPOWER such son or sons of mine as shall then manage the said business and desire to purchase the same, or, if there be no such son, any son of mine, (the elder to have priority of choice before the younger), to purchase all the leasehold property, stock, capital, plant, implements, utensils, and effects, which shall then be employed or engaged in the said business, (excepting or including, at the option of such son or sons, all or any part of the sugars which shall then be manufactured or refined and saleable, and also all or any of the debts which shall be owing to my trust estate on account of the said business; And also excepting or including, at the option of such son or sons, but only with the consent of my trustees or trustee, any such leasehold buildings and premises, with the plant, utensils, and effects therein, as my trustees or trustee may think would without material loss be saleable or disposable apart from the rest of the said trust-premises). —option to sons to purchase all or a specified part of the capital, &c.;

49 *e*[5]. I DECLARE, that the price to be paid by such son or sons for the trust-premises so purchased by him or them shall be ascertained by two valuers, of whom such son or sons shall appoint one, and my trustees or trustee shall appoint the other, or by an umpire to be appointed by such valuers before they enter upon the valuation, in which valuation the goodwill of the said business is not to be considered; Such valuation to be made, at the option of such son or sons, either previously or subsequently to his or their entering into a binding contract. —price to be ascertained by valuers;

49 *e*[6]. AND as to the said trust-premises, in case no son of mine should be competent or willing to purchase the same or any part thereof when the said business shall be discontinued by my trustees or trustee, and as to such parts of the said trust-premises as shall not be sold as aforesaid, I DIRECT my trustees or trustee to convert the same into money, and add the same to my residuary personal estate. —general trust for conversion and investment;

42 e^{7}. I DIRECT my trustees or trustee from time to time to invest such parts of my residuary personal estate as shall come to their or his hands, and shall not be employed in the said business, or be immediately distributable under the trusts hereinafter declared, upon Government, parliamentary, or real securities in England or Wales, (and not in Ireland); With power from time to time (with the consent of my wife, if living) to vary such investment.

—power to leave purchase-money on personal security;

49 e^{8}. I AUTHORISE my trustees or trustee, in their or his discretion, to allow any purchase-money for all or any part of my personal estate which shall be sold to any son or sons of mine, or to any other person or persons, to remain, for any time not exceeding five years, at interest at £4 per cent. or upwards, on such personal or other security as my trustees or trustee shall think fit. (*Power to compound debts, &c.* (48 b^{3})).

—son or sons to receive one-fourth of profits during management;

—subject thereto, profits to be deemed income.

49 e^{9}. I DECLARE, that, while my business shall be carried on under the trusts of my will, one equal fourth part of the profits thereof shall be paid to any son or sons of mine who shall manage the same, in addition to any other benefit hereby given to him or them; And that, subject to such deduction of one-fourth part (if any) the clear profits of my said business, while the same shall be carried on under the trusts of my will, shall be deemed part of the income from my personal estate.

Bequest to trustees of coal and iron works, leases, and residuary personal estate,

49 f^{1}. I GIVE AND BEQUEATH all my coal and iron works, parts or shares of coal and iron works, and all my leases and parts or shares of leases of coal, ironstone, and iron ore, with all lands and other appurtenances thereto belonging, and also all my money, securities for money, debts, goods, chattels, and other personal estate and effects whatsoever not hereby otherwise disposed of, and I also appoint and dispose of all the personal estate over which I have or may acquire any disposing power, unto the said [*trustees*], their executors and administrators, upon the trusts following, (that is to say),

—upon trust to raise money for payment of debts, &c.;

49 f^{2}. UPON TRUST, with all convenient speed after my decease, to call in and convert into money such parts of my personal estate (except my said coal and iron works and concerns), as my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will shall judge necessary for payment of my just debts, funeral and testamentary charges and expenses, and the several pecuniary

legacies hereby bequeathed, and to pay and discharge therewith such debts, charges, expenses, and legacies accordingly; AND UPON FURTHER TRUST either to convert into money any other part or parts of my residuary personal estate (except my said coal and iron works and concerns), or to continue the same in the actual state thereof (*a*), as my said trustees or trustee for the time being shall think fit. (*Power to compound debts, &c.* (48 *c*[3]); *Trust for investment, &c.* (48 *d*)).

—to convert residue (except coal and iron works);

49*f*[3]. AND as to my said coal and iron works and the business thereof, my will is, and I hereby direct, that my trustees or trustee for the time being shall carry on and conduct the same, and transact all matters and things relating thereto, either alone or in conjunction with the other persons or person then interested as partners or partner therein, as the case may be, for the space of —— years next after my decease, but subject to the proviso hereinafter contained. (*Powers of management* (49*b*[3])).

—as to the coal and iron works, trustees to carry on the same for —— years;

49*f*[4]. AND I DIRECT that all losses, charges, and expenses attending or to be incurred in the carrying on of my said business, shall be borne, paid, and defrayed, in the first instance, out of the gains and profits thereof, and, if they should be insufficient, then out of my residuary personal estate; And the monies to arise therefrom, and all the gains, profits, and increase of the said business, shall be added to and considered as part of the said residuary personal estate, and shall be applied and go in such manner as hereinafter is directed.

—losses and gains to fall upon and be deemed part of personal estate;

49*f*[5]. AND I DIRECT, that my trustees or trustee for the time being shall from time to time, after my decease, take annual accounts of the stock and capital employed in my said business, and shall make out annual accounts of the gains, profits, losses, and expenses of the same business, and of all transactions relating thereto; Which accounts shall be audited and settled by my said wife and my said children, or such of them as shall from time to time be living and shall have attained the age of twenty-one years. AND in case my said wife and all my said children should die while my said business shall be carried on, then by the respective guardians of the several infant children of them my said children, or of such of them as shall leave children.

—trustees to take annual accounts;

—accounts to be audited by wife and children, or guardians of infant grandchildren;

(*a*) Here, it will be observed, that the discretion respecting the period and manner of conversion is introduced into the original trust instead of being conferred by a subsequent clause.

—power to admit the son to a share of the concerns;

49 *f* [6]. PROVIDED ALWAYS, that if my said son should attain the age of twenty-one years, and should thereupon or at any time thereafter be desirous to enter into and participate in my said business, then my said trustees or trustee shall admit my said son into such part or proportion of my said business as they or he shall think proper, not being less than one equal fourth share, nor exceeding in the whole one equal moiety or half share thereof, And shall thereupon assign and make over to my said son a like proportion of all the capital stock, leases, monies, and other effects belonging to or used and employed in the said business, upon my said son giving security unto and to the satisfaction of my said trustees or trustee for the payment of the worth or value (to be settled by two indifferent persons, one to be nominated by each party) of so much and such part of the premises as shall be assigned to my said son, with interest at the rate of £5 per centum per annum; Which security may be the bond of my said son, if my said trustees or trustee should think proper to accept the same, but not otherwise.

—power to discontinue the concerns, if disadvantageous;

49 *f* [7]. PROVIDED ALWAYS, that if my trustees or trustee for the time being should, at any time or times during the said period of —— years, to be computed from my death, find it disadvantageous, or deem it unadvisable to carry on my said business or any part or branch thereof, then and in any such case it shall be lawful for them or him, with the consent in writing of my said wife and my said children, or such of them as shall be then living and shall have attained the age of twenty-one years, and in case my said wife and all my said children should die while my said works and concerns shall be carried on, then with the consent in writing of the respective guardians of the several infant children, if any, of them my said children, or of such of them as shall leave children, and if there should be no such children, then in the discretion and of the sole authority of the said trustees or trustee, absolutely to close and discontinue my said business, or any part or branch thereof, and all accounts and transactions relating thereto.

—upon the determination of the concerns, trustees to sell and pay debts;

49 *f* [8]. AND I DIRECT, that, upon such determination of my said business or any part thereof, or else upon the expiration of the said term of —— years hereinbefore appointed for carrying on the same, my said trustees or trustee for the time being shall sell, collect, and convert into money, all the capital stock, leases, monies, and other effects belonging to or

used in the same; And shall thereout pay all debts and expenses owing and incurred from and on account of the same, and adjust and settle all accounts relating thereto.

49 *f*[9]. And as to as well the clear gains and profits of my said business while the same shall be carried on, and the clear surplus of the monies into which the capital of the said business shall be converted on the same being closed, (which profits and surplus I declare shall form part of the capital of my residuary personal estate), as also the residue of my personal estate, and the monies to arise therefrom after payment of my said debts, legacies, funeral and testamentary expenses, I direct my said trustees or trustee for the time being, from time to time, to lay out and invest the same in their or his names or name, &c., (*as in* (48 *a* [3])). —to invest profits and the residue of personal estate, after payment of debts, legacies, &c. ;

49 *f*[10]. And I hereby declare my will to be, that my said trustees or trustee shall stand and be possessed of and interested in all my said residuary personal estate and effects, subject as aforesaid, and all my said coal and iron works and concerns, during the continuance of the same, and the monies to arise therefrom and from the conversion into money of the capital thereof when the same concerns shall be closed, and the stocks, funds, and securities, in or upon which such residuary personal estate and effects, gains, profits, and capital, shall be laid out or invested, or which shall otherwise form part thereof respectively, and the annual produce and income thereof, upon the trusts hereinafter declared; (that is to say). (*The trusts need contain no special reference to the business or profits*). —and to stand possessed of all the residuary personal estate, upon following trusts.

50. And in pursuance and execution of the power given to me under or by virtue of the articles of copartnership by which the business of a common brewer and other businesses at —— are now carried on by me in copartnership with ——; And in exercise and execution of all and every or any other right or power possessed by me in this behalf, I nominate and appoint my three sons, [*names*], to be my successors in the said copartnership business or businesses; And I hereby give to and vest in them, my said three sons, all rights, powers, and privileges, which I am in anywise enabled to confer upon or repose in them as my successors in the said copartnership business or businesses. Appointment of successor in partnership under a power in the articles.

DISPOSITIONS OF RESIDUARY REAL AND PERSONAL ESTATE.

Realty and personalty to one.

51 *a*. I GIVE, DEVISE, AND BEQUEATH all my real and personal estate, whatsoever and wheresoever, unto my wife, [*name*]; To HOLD the same unto her my said wife, her heirs, executors, administrators, and assigns, according to the natures thereof respectively, for her own absolute use and benefit.

General devise and bequest to A. B.;

51 *b*[1]. I DEVISE, BEQUEATH, AND APPOINT all the freehold, copyhold, and leasehold lands and personal property over which I have or shall have any disposing power, (including estates vested in me as trustee or mortgagee), unto the said [*name*], his heirs, executors, administrators, and assigns; as to the said trust or mortgage estates, subject to the trusts affecting the same; and as to my beneficial property, for his or their own use, but subject to the payment of my debts.

—subject to debts;

—if A. B. be dead, appointment of executors and trustees; and devise to such uses as they shall appoint;

51 *b*[2]. IF the said [*name*] should be dead at my decease, I APPOINT [*executors*] to be my executors and trustees; AND I DEVISE AND APPOINT the said freehold and copyhold hereditaments To SUCH USES as my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, shall, at the request of the person or persons beneficially entitled thereto, or for the payment of my debts, at any time or times before the expiration of twenty-one years from the decease of such survivor, by deed appoint; And, subject thereto, I DEVISE, BEQUEATH, AND APPOINT the said hereditaments and personal property (except trust and mortgage estates) unto the child or children of the said [*name*] living at my decease, and the child or children then living of such child or children of the said [*name*] as may be now dead, or may die before me, and his, her, or their heirs, executors, administrators, and assigns, for his, her, or their own benefit, in equal shares as between brothers and sisters, but subject to the payment of my debts, and so that the child or the children collectively of a deceased child shall take only such share as his, her, or their parent would have taken if living.

—and, subject thereto, to children of A. B. as tenants in common;

—substitution of children of deceased children.

Residue of real and personal estate as wife shall appoint;

51 *c*. I DIRECT my said trustees or trustee to be seised and possessed of the residue of my real and personal estate, UPON SUCH TRUSTS as my said wife, [*name*], shall, at any time or times, by will or (being unmarried) by deed appoint; AND, subject thereto, UPON TRUST to pay to or permit my said wife, [*name*], to receive during her life the income from such parts of my

—subject thereto, for wife for life, and after her

said residuary estate as shall produce income, for her separate use [and maintenance, and the maintenance and education of my infant sons and unmarried daughters], and to use and enjoy such parts thereof as shall consist of furniture, linen, plate, china, jewels, trinkets, books, pictures, horses, carriages, or other chattels of a like nature, for her separate use. AND I direct, that all chattels of such nature as lastly aforesaid, to be purchased or procured by my said wife, [*name*], with or by means of any monies or funds to be received or made available by her out of any part of my said residuary estate, or the income thereof, shall be held by my said trustees or trustee in trust for her separate use. AND, subject to the trusts aforesaid, my said trustees or trustee shall be seised or possessed of my said residuary estate, and the income therefrom, UPON TRUSTS corresponding as nearly as may be with the trusts hereinbefore declared concerning the said sum of £——, and the income therefrom.

death, for children (by reference to trusts of portions);

—chattels to be purchased by wife with trust monies to be for her separate use.

51 *d*[1]. I GIVE the residue of my real and personal estate to such child or children of mine living at my death, and such issue of any my child or children then deceased, as shall survive me and attain the age of twenty-one years, and his, her, or their heirs, executors, administrators, and assigns respectively, in equal shares as between brothers and sisters; But so that no issue of any my surviving grandchild shall be included in this gift; And so that the child or the children collectively of any deceased child or grandchild shall take only the share which his, her, or their parent would have taken if living.

Residue of realty and personalty to children and the issue of deceased children;

51 *d*[2]. I GIVE to my trustees or trustee for the time being full discretionary power to apportion my said residuary estate among the persons entitled thereto; and for that purpose, by any deed or deeds to appoint uses of any hereditaments, and, if they or he think fit, to sell or mortgage the same or any part thereof, or to charge any sum or sums on any parts or part thereof, for equality of partition. (*General powers to trustees to manage and let, and for maintenance*).

—power to apportion among devisees.

51 *e*. I DEVISE AND APPOINT all the hereditaments, of whatsoever tenure, over which I have any disposing power, and not otherwise disposed of by my will, To SUCH USES as my said trustees or trustee, at any time or times before the expiration of twenty-one years from the death of the survivor of

General devise and appointment of residuary real estate to such uses as trustees shall appoint, in de-

fault to them in fee;
—general bequest of personalty.

the persons herein mentioned by name, shall by deed appoint; And, subject thereto, I devise and appoint such of the same hereditaments as are of freehold tenure, and I bequeath and appoint the leasehold and personal estates, not otherwise disposed of, over which I have any disposing power, unto my said trustees, their heirs, executors, administrators, and assigns respectively, upon the following trusts:—

General devise and bequest to trustees of marriage settlement;

51 *f*. I CHARGE my real estates with the payment of my debts; AND, subject thereto, I give the same and the residue of my personal estate to [*trustees*], or such other persons or person as at the time of my decease may be trustees or trustee under my said marriage settlement, their or his heirs, executors, administrators, and assigns, TO USES AND UPON TRUSTS corresponding as nearly as may be to the uses and trusts in the said settlement contained concerning the freehold estates thereby settled; WITH full discretionary power to sell, exchange, partition, invest, and otherwise change the nature of any part of my said property, upon such terms and subject to such conditions as they or he may think convenient or expedient, and for that purpose to enter into special stipulations as to biddings, title, evidence, expenses, compensation, indemnity, arbitration, security for purchase-money, or otherwise; And with power to buy in, or to rescind or vary any contract, and to resell. AND I APPOINT the said trustees or trustee to be my executors or executor.

—power to sell, &c.;

—appointment of executors.

Freeholds, leaseholds, and personalty to trustees for absolute conversion (*a*);

52 *a*[1]. I GIVE, DEVISE, BEQUEATH, AND APPOINT all [*parcels*] (*b*), and other [the freehold and leasehold manors, messuages, lands, tenements, and hereditaments whatsoever and wheresoever, of or to which I or any person or persons in trust for me now am, is, or are, or at the time of my decease shall be seised, possessed, or entitled, either in possession, remainder, or reversion, and either for a vested estate or in

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(*a*) [This is the best of the common forms of trusts for conversion, but the forms (52 *d*) and (52 *f*) are preferable.]

As to describing parcels in will.

(*b*) [A particular description of all the testator's real property, with reference to locality, tenancy, and title, should, if possible, be inserted in the will. The title to a small estate which has been long in the same family, and has passed only by descent or devise, is frequently almost unmarketable, on account of the difficulty of proving its identity, and of connecting such evidence as leases, land-tax certificates, &c. may afford with the wills under which the property has passed.]

expectancy or contingency, or over which I have or at the time of my decease shall have any power of appointment or disposition, with their and every of their appurtenances, and all other] my real and all my residuary personal estate, of what nature or kind soever (except copyhold or customary lands, tenements, and hereditaments), UNTO AND TO THE USE of [*trustees*], their heirs, executors, administrators, or assigns respectively, according to the natures and qualities thereof respectively.

52 *a* [2]. UPON TRUST, nevertheless, that they, the said [*trustees*], or the survivors or survivor of them, or the executors or administrators (*a*) of such survivor, or other the trustees or trustee for the time being of my residuary estate, will or shall, as soon as conveniently may be after my decease, (but as to any reversionary estate or estates or interest or interests of or to which I may be seised, possessed, or entitled, not until the same respectively shall fall into possession, unless my said trustees or trustee should think a prior sale expedient), absolutely sell, dispose of, and convert into money all such parts of the said trust estates and premises as shall not consist of money, and will or shall collect and get in all such parts of the same trust premises as shall consist of money belonging or owing to me at the time of my decease.

—trust to sell;

—reversionary interests not to be sold;

52 *a* [3]. AND I AUTHORISE AND REQUIRE my said trustees or trustee for the time being, at any time or times before the expiration of twenty-one years from the decease of the survivor of my said trustees herein named, but as soon as conveniently may be after my decease, to make sale and dispose of all [*parcels*], and all other the copyhold or customary messuages, lands, tenements, and hereditaments whatsoever and wheresoever, of or to which I or any person or persons in trust for me

—authority to sell copyholds;

(*a*) [The common forms usually run thus:—

"the said [*trustees*], or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, or their or his assigns,"

so that, upon the death of a sole trustee, the power of sale would vest as to the freeholds in his heir, and as to the personalty in his executors or administrators. It is much better, in all cases, to provide, that the discretionary powers of a sole trustee shall vest in his executors or administrators, who are always accessible and competent to act. In addition to this precaution, the dominion over the legal estate should be given to the same parties by means of a power of appointment, as in some of the subsequent forms.]

As to vesting powers in the heirs of a surviving trustee.

now am, is, or are, or at the time of my decease shall be, seised, possessed, or entitled, either in possession, remainder, or reversion, and either for a vested estate or in expectancy or contingency, or over which I have, or at the time of my decease shall have, any power of appointment or disposition, with their and every of their appurtenances (*a*).

—to sell in such manner and on such conditions as trustees shall think fit;

52 *a* [4]. And I declare, that my said trustees or trustee for the time being may make any sale or sales of my said freehold, copyhold or customary and leasehold manors, messuages, lands, tenements, and hereditaments, either by public auction or private contract, and under such stipulations or conditions as to the title to be required by a purchaser or purchasers, or the information to be given, or evidence to be produced in support of the same, or the expenses of and incident to the deduction, examination, or proof of the title, or the completion of the sale or otherwise, or as to any compensation for or indemnity against mis-statements, errors, or defects, or any other stipulations or conditions whatsoever, and, generally, to sell in such manner as they, he, or she shall deem expedient; And that they, he, or she shall have full power to buy in the same premises, or any part or parts thereof, at any sale or sales by auction, and to rescind or vary any contract or contracts which shall have been entered into for the sale of the same premises or any part or parts thereof whatsoever, by public auction or private contract, and to resell the premises which shall have been so bought in, or as to which the contract or contracts for sale shall have been so rescinded, without being in anywise answerable for any loss which may happen thereby.

—to buy in and sell;

—authority to settle claims, compound debts, &c.;

52 *a* [5]. And I authorise and empower my said trustees or trustee for the time being, in their or his absolute discretion, to adjust, settle, and wind up all my accounts, affairs, and concerns, and to admit, allow, pay, compound, compromise, refer to arbitration, waive, suspend, release, or take personal

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Authority to sell copyholds.

(*a*) It will be obvious to the learned reader, that the copyholds are not included in the devise of the freeholds, in order that the trustees may be enabled to confer a title on a purchaser without being admitted, (vide ante, Vol. 9, pp. 186, 424); and that the power of sale is restricted in regard to the period of its exercise, for the purpose of keeping it within the limit prescribed by the rule against perpetuities. Vide ante, p. 157. [The objection to a mere authority to sell copyholds, as distinguished from a power of appointment, is, that it does not enable the trustees to confer a power of appointment on the purchaser.]

or other security for any debts, claims, liabilities, demands, differences, and disputes whatsoever, which, at the time of my decease, or at any time after my decease, shall or may exist or be owing to or from, or be made on behalf of or against, or arise in relation to, my real or personal estate and effects, and that whether the same be legally enforceable or provable or not.

—trustees to be possessed of proceeds of residue;

52 *a*[6]. And I declare, that my said trustees or trustee for the time being shall stand and be possessed of and interested in the monies to arise, be produced, and be realised from or by such sale, disposition, converting into money, collecting and getting in of my residuary real and personal estates as aforesaid, and also of all the ready money of which I shall be possessed at the time of my decease, after full payment and satisfaction of all costs, charges, and expenses of and incident to the execution of the trusts and powers hereby reposed in and given to them and him respectively,

—upon trust to pay debts and legacies and invest surplus;

52 *a*[7]. Upon trust, in the first place, to pay, satisfy, and discharge all my funeral and testamentary expenses and just debts, and the legacies given and bequeathed by my will or any codicil thereto; And from and after payment thereof, to lay out and invest all the residue of the said monies in their, her, or his names or name, in the public stocks or funds of Great Britain, or at interest upon real security in England or Wales, [and not in Ireland]; With power for my said trustees or trustee from time to time to alter, vary, or transpose the same into or for other stocks, funds, or securities of the like nature, at their, his, or her discretion.

—power to vary investments;

—power to lease until sale;

52 *a*[8]. And I direct and declare, that, while my said freehold, copyhold or customary and leasehold hereditaments, or any of them, shall remain unsold under the power of sale hereinbefore contained, it shall be lawful for my said trustees or trustee for the time being from time to time to let and demise the same, or so much or such parts thereof as for the time being shall remain unsold, or any part of the same, at rack rent, either from year to year, or for any term of years [in possession](*a*) not exceeding twenty-one years from the time of letting, and with, under, and subject to such covenants, conditions, and agreements as my said trustees or trustee shall think proper.

(*a*) [These words are usual, but not useful. It is often convenient to grant a lease to commence in possession a few months after the time of execution.]

—power to manage;

52 *a*[9]. And I direct and declare, that, while my said freehold, copyhold or customary and leasehold hereditaments, or any of them, shall remain unsold under the power of sale hereinbefore contained, it shall be lawful for my said trustees or trustee for the time being, in their or his absolute discretion, at the cost of the said trust-premises, to repair, drain, improve, insure from fire, and manage the same, or such parts thereof as for the time being shall remain unsold; And also to adjust and determine in what proportions the expense of draining or other improvements shall be borne by the capital and income of the said trust premises respectively; And also to adjust, compound, and settle all accounts and claims respecting the same, and to make such allowances to tenants and others in relation thereto as they or he shall think just; And also to enter into the possession of, or receive the rents and profits arising from, my said copyhold or customary hereditaments, as well as my said freehold and leasehold hereditaments, or such of them respectively as for the time being shall remain unsold.

—power to receive rents of copyholds until sale;

—application of rents until sale;

52 *a*[10]. And I direct and declare, that the rents and profits arising from the said freehold, copyhold or customary and leasehold (*a*) hereditaments, from the time of my decease until the sale thereof, shall from time to time (after payment thereout of the costs of fire-insurance, repairs, management, ground-rents, and other periodical or current outgoings,) be paid and applied in the same or the like manner in all respects as the annual income arising from the monies to be produced by the sale of such hereditaments would have been payable and applicable, by virtue of the trusts hereinafter contained, if such sale had been made.

—trustees' receipts to discharge purchasers;

52 *a*[11]. And I further direct and declare, that the receipts in writing of my said trustees or trustee for the time being for any purchase-monies, rents and profits, or other trust-monies to be received by them or him by virtue of any of the trusts and powers respectively contained in my will, shall be valid and effectual discharges to the person or persons paying the same monies; and that the person or persons paying such monies shall not be answerable or accountable for the application of the same monies (*b*).

(*a*) [If it is the intention, confine this declaration to the estates of inheritance.]

(*b*) [This clause is usually inserted among the general clauses relating to the trustees, but as there is danger of its being forgotten there, it is better to insert it here also.]

52 *a*[12]. And I direct, that my said trustees or trustee for the time being shall stand and be seised and possessed of and interested in my said residuary real and personal estate and the monies, stocks, funds, and securities, of, in, to, or upon which the same shall for the time being consist or be converted or invested, and the annual produce and income thereof, Upon and for the trusts, ends, intents and purposes, and with, under, and subject to the powers, provisoes and declarations hereinafter declared, expressed, or contained of and concerning the same; (that is to say),

—trustees to stand possessed of proceeds of residue upon trusts.

52 *b*[1]. And I authorise and empower (but do not require) my said trustees or trustee for the time being, (unless otherwise directed by my said daughter, [*name*]), to defer and postpone the calling in of any debt or debts carrying interest, which may be owing to me from my said daughter's husband, [*name*], at the time of my decease, for such period as my said trustees or trustee shall think fit.

Authority to defer calling in debts owing by son-in-law;

52 *b*[2]. And I declare, that the said debt or debts shall, in the valuation and distribution of my residuary personal estate under the trusts of my will, be taken at the nominal amount or amounts thereof, and be appropriated, so far as the same, taken at such amount or amounts, shall be required or be applicable, in or towards satisfaction of the share of the produce of my residuary real and personal estates hereby [settled, upon trusts and subject to powers corresponding with the uses, trusts, and powers hereinbefore limited and contained concerning my said hereditaments at ——, purchased of ——.] Provided, nevertheless, that the foregoing power to leave the said debt or debts outstanding shall extend to the full amount or amounts of such debt or debts, whether the same shall exceed the amount of the last-mentioned share or not.

—such debts to be taken at their nominal amount in distributing the residue;

52 *c*. I direct, that the trustees or trustee for the time being of my residuary estate shall set apart, free from legacy duty, at their or his option, either wholly or in part, from any money which at my decease may be payable to my estate from or in respect of any copartnership then existing between me and my sons or any of them, or which may at my decease be owing to me on any account by my sons or any of them, or wholly or in part from other my estate and effects, the said two several legacies or sums of £—— and £——, with interest thereon respectively at £5 per centum per annum from

Power to set apart any debts owing from testator's sons, and transfer the same to the trustees of certain legacies in satisfaction thereof;

the day of my decease; AND, at the absolute discretion of my said trustees or trustee, shall either raise and pay the said two legacies or sums within a convenient time after my decease, with interest thereon, unto the said [*trustees of legacies*] or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of the said legacies or sums, in such manner as such last-mentioned trustees or trustee shall require, or assign unto and vest in such trustees or trustee the securities or security on which such sums of money respectively, or any part thereof, shall for the time being be outstanding, and the remedies for recovering the same, such assignment to be made at the costs of my residuary personal estate. AND I AUTHORISE the said trustees or trustee for the time being of the said two several legacies or sums of £—— and £——, at their or his absolute discretion, to accept such funds, or such securities or security, whether personal or otherwise, for the said two several legacies or sums, either in full satisfaction of or for the said several legacies or sums, or of or for any specified part or parts thereof respectively, or otherwise upon such terms and conditions as they or he shall think proper; AND ALSO, either to permit all or any of my sons from whom any money shall be payable or owing as aforesaid, to retain the same or any part thereof at interest (or, if such last-mentioned trustees or trustee shall think fit, by way of partnership with such trustees or trustee), for such period or periods, and either on any security or securities which, at the time of my decease, I may hold for the same, or on such personal or other security as the said trustees or trustee shall think fit, or to call in the said several legacies or sums respectively, or such part or parts thereof respectively, as shall not be permitted to be retained by my sons as aforesaid, and invest the same in the public stocks or funds of Great Britain, or on any real securities in England or Wales. (*Add special power to appoint trustees of legacies, and authority to give receipts*).

—authority to trustees of legacies to accept specific funds in satisfaction;

—to leave debts from sons outstanding at interest or by way of partnership.

Absolute trusts for conversion of residuary real estate (*a*);

52 *d*[1]. I GIVE, DEVISE, AND APPOINT [*parcels*], and all other the freehold and copyhold or customary manors, messuages, lands, tenements, and hereditaments, in or over which, at the time of my decease, I shall have any devisable interest or

(*a*) [This form is applicable, whether the proceeds of the realty are to be added to the personalty, or are subjected to distinct trusts.]

disposing power, and not otherwise effectually devised, appointed, or disposed of by my will, (except hereditaments vested in me as mortgagee or trustee merely (*a*)), To SUCH USES as the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will (*b*), shall, at any time or times, or from time to time, before the expiration of twenty-one years from the decease of the survivor of my said trustees herein named, by any deed or deeds direct, limit, or appoint; AND, in default of any such direction, limitation, or appointment, and in the meantime, and subject to any such direction, limitation, or appointment, [I GIVE, DEVISE, AND APPOINT all the said copyhold or customary hereditaments unto [*one of the trustees*], his heirs and assigns, UPON TRUST, to be disposed of according to the directions of my said trustees or trustee for the time being; And in case the said [*name*] should die before me, or before he shall be admitted tenant of the said copyhold or customary hereditaments respectively, Then I GIVE, DEVISE, AND APPOINT the same, or such of them as the said [*name*] shall not have been admitted to, unto [*another trustee*], his heirs and assigns, upon the same trusts; Or in case he also should die before me, or before obtaining such admittance, then I GIVE, DEVISE, AND APPOINT the same hereditaments, or such of them as he shall not have been admitted to, unto the said [*third trustee*], his heirs and assigns, upon the same trusts (*c*); AND, (subject as aforesaid)], I GIVE, DEVISE, BEQUEATH, AND APPOINT all the freehold and leasehold manors, messuages, lands, tenements, and hereditaments, in or over which at the time of my decease I shall have any devisable interest or disposing power, and not otherwise effectually devised, bequeathed, or

—power to appoint freeholds and copyholds;

—devise of copyholds to one of the trustees;

—devise of freeholds and leaseholds to trustees;

(*a*) [This exception is superfluous, as to the mortgaged estates at least, which should be devised by a separate clause to the trustees, with a power of appointment.]

(*b*) [After this reference to the trustees for the time being has once been used, so as to shew that a sole trustee and the executors or administrators of a surviving trustee may act in the trusts, the trustees may afterwards be referred to as "my said trustees or trustee for the time being."]

Mode of referring to future trustees;

(*c*) [This devise will be proper where the estate may descend to coparceners, in order to prevent the admittance of the coparceners (upon which the fine is generally heavier than on the admittance of one person) being insisted on in case the sale is delayed. See the next note.]

appointed by my will, (except hereditaments vested in me as mortgagee or trustee merely), UNTO AND TO THE USE of the said [*trustees*], their heirs, executors, administrators, and assigns, according to the respective tenures and natures thereof.

—trust for sale; 52 *d*[2]. AND I DECLARE, that the foregoing power of appointment is vested in my said trustees or trustee, and the said freehold and leasehold hereditaments are devised and bequeathed unto my said trustees, UPON TRUST, that they or he my said trustees or trustee for the time being will or shall, either immediately after my decease, or at any time afterwards, as my said trustees or trustee for the time being shall deem expedient, make sale, and absolutely dispose of the said freehold, copyhold or customary and leasehold hereditaments and premises, either altogether or by parcels, and at one time or at several times, and either by public auction or private contract, or partly by public auction and partly by private contract, as my said trustees or trustee in their or his discretion shall think fit; And will or shall appoint, convey, assign, or otherwise assure the same when sold, in such manner as the purchaser or purchasers thereof shall require (*a*).

As to the form of gifts of residue in trust for conversion.

(*a*) [The forms of trust for conversion of real and personal estates in ordinary use are very defective. The mixed residue is usually given to the trustees, their heirs, executors, administrators, and assigns; and the power of sale is made to follow the respective estates, (i. e. is given to the trustees, "their heirs, executors, administrators, and assigns,") so that, in case of the death of a sole trustee, the trusts and powers relating to the real and personal estates become separated, and the former may become vested in an infant or lunatic heir, or may not find an heir in whom to vest. The copyholds, too, under such dispositions, are vested in several trustees and cannot be got out of them except by their being admitted (on payment of a larger fine than is due on the admittance of one person, (ante, Vol. 9, p. 424)), and surrendering to the use of the purchaser. These inconveniences are avoided in the above form. The power of sale is made to devolve on the executors or administrators of a sole trustee, (and see the forms of TRUSTEE CLAUSES), the copyholds are left to descend to the heir, generally a single person, who will be admitted if the lord insists on the tenancy being filled before a sale is completed, while complete dominion over the copyholds is given to the trustees by means of a power of appointment, (under which they can entitle a purchaser to be admitted without any intermediate surrender or admittance), and an authority to let and to receive the rents. By extending the power of appointment to the freeholds, any inconvenience which might otherwise arise from the incapacity or want of an heir, is avoided, and the power of completing a sale is made always to accompany the authority

Advantages of the form in the text.

[But I direct and declare, that any reversionary estates or interests of or to which I may be seised, possessed or entitled, (other than reversions to which a beneficial rent is incident), shall not be sold until the same respectively shall fall into possession, unless my said trustees or trustee should think a prior sale expedient (*a*).] —reversions not to be sold;

52 *d* [3]. And I authorise and empower my said trustees or trustee for the time being, in their or his discretion, in the exercise of the power of sale hereinbefore contained, to make and enter into any special conditions or stipulations relative to the title to the freehold, copyhold or customary or leasehold hereditaments offered for sale, or the information to be given or evidence to be produced in support of the title, or the expenses of and incident to the deduction, examination, proof or completion of the title, or the completion of the sale or otherwise, or as to any compensation for or indemnity against mis-statements, errors, or defects, or any other stipulations or conditions whatsoever, and generally to act in and about such sales in such manner as they or he shall deem expedient; And also to buy in the said hereditaments, or any part thereof, at any auction or auctions, and to rescind or vary any contract or contracts which shall have been entered into, and to resell any hereditaments which shall have been bought in or the contract for the sale of which shall have been rescinded, at any future auction or auctions or by private contract as aforesaid, without being liable to answer for any loss or diminution in price occasioned by such resale. —authority to make special stipulations and buy in, &c.;

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to sell. Again, if the parties entitled to the proceeds of the sale are sui juris, and elect to take the real estate in specie, the power of appointment will enable the trustees to effectuate the arrangement in the most inexpensive manner, and without requiring the admittance of the heir, or if, on account of delay in completing the arrangement, the admittance of the heir has been enforced, he may generally be left as tenant on the rolls during his life, and the estate in the meantime may be dealt with, as occasion requires, by means of successive appointments; and if, when the lord insists on an admittance, the inheritance is in coparceners, the trustees may, by appointing to one of their own number, entitle him to admittance.]

[If it is desired to save the legacy duty in the event of a sale not being required, the form (52*f*) should be used.]

(*a*) [It may often be inexpedient to suspend the sale of reversions; but with the above qualification the clause is unobjectionable.]

—trust of monies arising from sales;

—to pay costs;

52 d^4. And I direct and declare, that my said trustees or trustee for the time being, shall apply the money to arise from or be produced by such sale or sales respectively, in the first place, in payment and satisfaction of all the costs, charges, and expenses of and incident to the execution of the trusts and powers hereby reposed in and given to them and him respectively [including any monies which my said trustees or trustee shall disburse or expend in or about any suit or suits at law or in equity for obtaining possession of the said hereditaments or any of them, or for carrying the said trusts into execution, and enforcing the performance of any contract or contracts to be entered into with any person or persons who shall agree to become the purchaser or purchasers of the said premises or any of them (*a*)].

—surplus proceeds of sale to be held upon the same trusts as the residuary personalty;

52 d^5. And I direct and declare, that the residue or surplus of the monies arising from or produced by such sale or sales shall from time to time sink into and form part of my residuary personal estate, and be held by my trustees or trustee for the time being, Upon the trusts, and for the ends, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations herein declared and expressed of and concerning my said residuary personal estate, (*or, if the trusts of the converted realty are to be separately declared, substitute the next clause* (52 d^6).

[(*or*), trust for investment of proceeds of real estate;]

52 d^6. And I direct and declare, that my said trustees or trustee shall lay out and invest all the residue or surplus of the monies arising from such sale or sales, after payment of the costs, charges, and expenses aforesaid [and payment of my funeral and testamentary expenses, debts, [and legacies], in case my personal estate should be insufficient for that purpose,] in the public stocks or funds of Great Britain, or at interest on real security in England or Wales, and not in Ireland; With power for my said trustees or trustee from time to time to alter, vary, or transpose the same into or for other stocks, funds, or securities of the like nature, at their or his discretion.

—power to vary investments;

—power to lease;

52 d^7. And I direct and declare, that while my said freehold, copyhold or customary and leasehold hereditaments, or any of them, shall remain unsold under the power of sale hereinbefore contained, it shall be lawful for my said trustees

(*a*) [These words may very properly be omitted.]

or trustee for the time being, from time to time to let and demise the same, or so much or such parts thereof as for the time being shall remain unsold, or any part of the same (*a*), at rack-rent, either from year to year, or for any term of years not exceeding twenty-one years [in possession] from the time of letting, and with, under, and subject to such covenants, conditions, and agreements as my said trustees or trustee shall think proper. AND I DIRECT AND DECLARE, that while my said freehold, copyhold or customary and leasehold hereditaments, or any of them, shall remain unsold under the power of sale hereinbefore contained, it shall be lawful for my said trustees or trustee for the time being, in their or his absolute discretion, at the costs of the said trust-premises, to repair, drain, improve, insure from fire, and manage the same, or so much or such parts thereof as for the time being shall remain unsold; And also to adjust and determine in what proportions the expenses of draining or other improvements shall be borne by the capital and income of the said trust premises respectively; And also to adjust, compound, and settle all accounts and claims respecting the same, and to make such allowances to tenants and others in relation thereto, as they or he shall think just; And also to enter into the possession of, or receive the rents and profits arising from, my said copyhold or customary hereditaments, as well as my said freehold and leasehold hereditaments, or such of them respectively as for the time being shall remain unsold. AND I DIRECT AND DECLARE, that the rents and profits arising from the said freehold, copyhold, or customary and leasehold hereditaments, from the time of my decease until the sale thereof, shall, from time time, after payment thereout of the costs of fire-insurance, repairs, management, ground-rents, and other periodical or current outgoings, be paid and applied in the same or the like manner in all respects as the annual income arising from the monies to be produced by the sale of such hereditaments would have been payable and applicable by virtue of the trusts hereinafter contained, if such sale had been made. AND I FURTHER DIRECT AND DECLARE, that the receipts in writing of my said trustees or trustee for the time being, for any purchase-monies, rents, and profits, or other trust-monies to be received by them or him by virtue of any of the trusts and powers respectively

—to repair, improve, and manage;

—to adjust accounts with tenants, &c.;

—to receive rents of copyholds;

—rents to be applied as income;

—receipts of trustees to be good discharges for trust-monies;

(*a*) [As the trust for sale is here imperative, powers to grant long leases for mining, building, or improving seem to be out of place.]

contained in my will, shall be valid and effectual discharges to the person or persons paying the same monies; and that the person or persons taking such receipts shall not be answerable or accountable for the application of the same monies. (*If the trusts of the proceeds of the realty are to be separately declared, add the following clause* (52 d^8). *If the proceeds of the realty are to be held on the same trusts as the personalty, the clause ante* (52 d^5) *will apply. The residuary bequest of the personalty, the discretionary powers as to getting in debts, &c.* (*ante* (48 a^1), *&c.*) *and the trusts for investment, will have preceded these clauses, and the trusts of the invested fund may either precede or follow them*).

—declaration of trusts of converted real estate.

52 d^8. And I direct and declare, that my said trustees or trustee for the time being shall stand and be possessed of and interested in the clear surplus arising from or produced by such sale or sales as aforesaid, Upon the trusts, and for the ends, intents, and purposes, and with, under, and subject to the powers, provisoes, conditions, and declarations hereinafter declared, expressed, and contained of and concerning the same, (that is to say).

Trusts for absolute conversion of residue where the real and personal estates are included in the same trust;

—power to appoint freeholds and copyholds;

52 e^1. I give, devise, and appoint all the freehold and copyhold or customary hereditaments in or over which, at the time of my decease, I shall have any devisable interest or disposing power, and not otherwise effectually disposed of by my will (except hereditaments vested in me as mortgagee or trustee merely (*a*)), To such uses as the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, shall, at any time or times before the expiration of twenty-one years from the death of such survivor, by any deed or deeds appoint (*b*). And in default of, and subject to any such appointment, I give, devise, bequeath, and appoint all the freehold and leasehold hereditaments, and all my personal estate, goods, chattels, and

—subject to power, residue (except copyholds) to trustees;

(*a*) [There should be a distinct devise of mortgage estates to such uses as the trustees shall appoint, and in default to the trustees in fee.]

(*b*) [A power to a surviving trustee to appoint by will is useless, as the power accompanies the office, while the copyholds are not intended to be vested in the trustees, and the freeholds may be devised by a sole trustee under his ownership.]

effects whatsoever and wheresoever, not otherwise effectually disposed of by my will, (except hereditaments vested in me as trustee or mortgagee merely), UNTO AND TO THE USE of my said trustees, their heirs, executors, administrators, and assigns respectively; AND I DECLARE, that the foregoing power of appointment is vested in, and the said freehold and leasehold hereditaments and personal estate and effects are devised and bequeathed unto, my said trustees or trustee.

—upon trust for conversion;

52 e^2. UPON TRUST, that my said trustees or trustee for the time being will or shall, as soon as conveniently may be after my decease, sell and dispose of and convert into money all my said residuary real and personal estate, or such parts thereof as shall not consist of money, or such investments of or securities for money of any kind herein authorised to be used for investment, as my said trustees or trustee for the time being shall think proper to retain; [except as to the articles hereinbefore bequeathed to my said wife, and as to such articles as soon as conveniently may be after her decease (*a*);] [but as to any reversionary estate or estates or interest or interests of or to which I may be seised, possessed, or entitled (other than reversions to which a beneficial rent is incident), not until the same respectively shall fall into possession, unless my said trustees or trustee shall think a prior sale expedient,] And will or shall collect and get in all such parts of the same trust-premises as shall consist of money belonging or owing to me at the time of my decease.

—reversionary interests not to be sold;

—authority to make special conditions, &c.;

52 e^3. AND I AUTHORISE AND EMPOWER my said trustees or trustee for the time being, in their or his discretion, in the exercise of the power of sale hereinbefore contained, to make and enter into any special conditions or stipulations relative to the title to the freehold, copyhold or customary or lease-

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(*a*) Where a life interest is created in property, the ulterior interest in which is blended with the general residue, and such residue is subject to an immediate trust for sale and conversion, the effect of the trust may seem to be to render the ulterior interest immediately disposable as a reversion. This, however, would be contrary to the intention of the testator, who, no doubt, in such cases, means that the property shall be sold when it falls into possession by the determination of the particular interest, and not before. This is so obviously the more beneficial course, that a judicial expositor of the will would probably lean to such a construction; which, however, it is better to render indubitable by explicit declaration, as in the text.

As to subjecting a reversionary interest to an immediate trust for sale.

hold hereditaments offered for sale, or the information to be given or evidence to be produced in support of the title, or the expenses of and incident to the deduction, examination, proof or completion of the title, or the completion of the sale or otherwise, or as to any compensation for or indemnity against mis-statements, errors, or defects, or any other conditions or stipulations whatsoever, and generally to act in and about such sales as he or they shall deem expedient. And also to buy in the said hereditaments or any part thereof at any auction or auctions, and to rescind or vary any contract or contracts which shall have been entered into, and to resell any hereditaments which shall have been bought in or the contract for the sale of which shall have been rescinded, at any future auction or auctions or by private contract as aforesaid, Without being liable to answer for any loss or diminution of price occasioned by such resale.

—to buy in, &c.;

52 *e*[4]. And I authorise and empower my said trustees or trustee for the time being, in their or his absolute discretion, to adjust, settle, and wind up all my accounts, affairs, and concerns; And to admit, allow, pay, compound, compromise, refer to arbitration, waive, suspend, release, or take personal or other security for any debts, claims, liabilities, demands, differences, and disputes whatsoever, which at the time of my decease, or at any time after my decease, shall or may exist, or be owing to or from, or be made on behalf of or against, or arise in relation to, my real or personal estate and effects, And that whether the same be legally enforceable or provable or not. And I declare, that my said trustees or trustee for the time being shall stand and be possessed of and interested in the monies to arise, be produced, and be realised from or by such sale, disposition, converting into money, collecting and getting in of my residuary real and personal estates as aforesaid, and also, of all the ready money of which I shall be possessed at the time of my decease, after payment of all costs, charges, and expenses of and incident to the execution of the trusts and powers reposed and vested in my said trustees or trustee, Upon trust, in the first place, to pay, satisfy, and discharge my funeral and testamentary expenses, debts, and the legacies given and bequeathed by my will or any codicil thereto, And from and after payment thereof, to lay out and invest all the residue of the said monies in their or his names or name in the public stocks or funds of Great Britain, or at interest on real security in England or Wales,

—to settle accounts, compound debts, &c.;

—proceeds of residue to be applied—

—in payment of costs, funeral and testamentary expenses, debts, and legacies;

—surplus to be invested;

and not in Ireland; With power for my said trustees or trustee from time to time to alter, vary, or transpose the same into or for other stocks, funds, or securities of the like nature, at their or his discretion. —power to change securities;

And I direct and declare, that while my said freehold, copyhold or customary and leasehold hereditaments, or any of them, shall remain unsold under the power of sale hereinbefore contained, it shall be lawful for my said trustees or trustee for the time being, from time to time, to let and demise the same, or so much or such parts thereof as for the time being shall remain unsold, or any part of the same, at rack-rent, either from year to year, or for any term of years [in possession] not exceeding twenty-one years from the time of letting, and with, under, and subject to such covenants, conditions, and agreements as my said trustees or trustee shall think proper. —power to lease;

And I direct and declare, that while my said freehold, copyhold or customary and leasehold hereditaments, or any of them, shall remain unsold under the power of sale hereinbefore contained, it shall be lawful for my said trustees or trustee for the time being, in their or his absolute discretion, at the costs of the said trust-premises, to repair, drain, improve, insure from fire, and manage the same, or so much or such parts thereof as for the time being shall remain unsold; —to repair, improve, and manage;

And also, to adjust and determine in what proportions the expenses of draining or other improvements shall be borne by the capital and income of the said trust-premises respectively; —to adjust accounts with tenants, &c.;

And also, to adjust, compound, and settle all accounts and claims respecting the same, and to make such allowances to tenants and others in relation thereto, as they or he shall think just;

And also, to enter into the possession of or receive the rents and profits arising from my said copyhold or customary hereditaments, as well as my said freehold and leasehold hereditaments, or such of them respectively as for the time being shall remain unsold; —to receive rents of copyholds;

And I direct and declare, that the rents and profits arising from the said freehold, copyhold or customary and leasehold hereditaments, from the time of my decease until the sale thereof, shall from time to time, after payment thereout of the costs of fire-insurance, repairs, management, ground rents, and other periodical or current outgoings, be paid and applied in the same or the like manner in all respects as the annual income arising from the monies to be produced by the sale of such hereditaments would have been payable and —rents to be applied as income;

applicable by virtue of the trusts hereinafter contained, if such sale had been made. And I further direct and declare, that the receipts in writing of my said trustees or trustee for the time being for any purchase-monies, rents, and profits, or other trust-monies, to be received by them or him by virtue of any of the trusts and powers respectively contained in my will, shall be valid and effectual discharges to the person or persons paying the same monies; And that the person or persons taking such receipts shall not be answerable or accountable for the application of the same monies. And I direct and declare, that my said trustees or trustee for the time being shall stand and be seised and possessed of and interested in my said residuary real and personal estate, and the monies, stocks, funds, and securities, of, into, or upon which the same shall for the time being consist or be converted or invested, Upon the trusts, and for the ends, intents, and purposes, and with, under, and subject to the powers, provisoes, conditions, and declarations hereinafter declared, expressed, and contained of and concerning the same, (that is to say):

—receipts of trustees to be good discharges for trust-monies;

—trusts of surplus proceeds of realty and personalty.

Devise of real estate to trustees with *discretionary* power to sell;

52 f^1. (*Power to appoint freeholds and devise of freeholds [and leaseholds], as in* (52 d^1)). And I declare, that the foregoing power of appointment is vested in my said trustees or trustee, and the said freehold [and leasehold] (*a*) hereditaments are devised and bequeathed unto my said trustees,

—trustees to hold estates on trusts of will;

Upon trust, that my said trustees or trustee for the time being will deal with and dispose of the same freehold, copyhold or customary and leasehold hereditaments, respectively, according to the trusts, intent, and meaning of my will.

—discretionary power to sell realty;

52 f^2. Provided always, and I hereby declare, that it shall be lawful for my said trustees or trustee for the time being, in their or his absolute discretion, and if and when they or he shall think fit, but not otherwise (*b*), to make sale

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(*a*) [The leaseholds will, of course, be liable to the legacy duty at all events; but they are included in these trusts, in order that the trustees' discretion as to the mode of sale, &c., may be extended to them.]

Legacy duty on real estate devised for sale.

(*b*) [This form of trusts for conversion of real estate is recommended for general use, on account of its excluding the liability to legacy duty of such parts at least of the real estate as are not sold by the trustees. An absolute direction to sell real estate in any event converts it into personalty, and renders it liable to the legacy duty, even though the

and absolutely dispose of the said freehold and copyhold or customary [and leasehold] hereditaments and premises, either

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beneficial donees should elect to take it in an unconverted state. But a mere trust for sale for payment of debts, or a discretionary power to sell, does not render the estate liable to duty; at least, if it is not sold. Whether, if a sale takes place, the duty attaches on the produce, is a question which the authorities have left in some doubt. The stat. 55 Geo. 3, c. 184, (sched., part 3), imposes the duty upon legacies given by the will of any person, "either out of his or her personal or movable estate, and out of or charged upon his or her real or heritable estate, or out of any monies to arise by the sale, mortgage, or other disposition of his or her real or heritable estate, or any part thereof." (See 45 Geo. 3, c. 38, s. 4, ante, Vol. 9, p. 560.) The material question in each case would appear to be, whether or not the trust or power operated in equity as a conversion of the property from realty to personalty*; so that the decision would depend upon the terms of the will, and not upon events subsequent to the testator's death. When the trust is of such a nature that if several persons were beneficially interested one might insist upon a sale, notwithstanding the opposition of the others, then it should seem the duty attaches, but not otherwise. This conclusion, however, is not consistent with all the cases. See *Att.-Gen.* v. *Mangles*, 5 Mee. & W. 120, ante, Vol. 9, p. 765, where it was held that the produce of land actually sold under a discretionary power of sale, was liable to the legacy duty: but see *Re Evans*, 2 Cr., M., & R. 206, contrà. Although, therefore, it will always be prudent, where the testator has not resolved that his real estate shall be sold in any event, to give the trustees a discretion, not merely to postpone but to dispense altogether with a sale, yet the exemption of the produce of such real estate as may actually be sold under such a power cannot be relied on. Where the intended trusts can be conveniently limited upon the assumption that the property may be enjoyed in specie, this should be done, and a discretionary power of sale should be superadded, as in *Re Evans*, 2 Cr., M., & R. 206. And if, under such limitations, the trustees vest the legal estate in the objects of the trusts, and *they* sell, the legacy duty will not attach.]

Effect of a discretionary power.

[It may be here observed that the proposition laid down, ante, Vol. 9, p. 789, that "personal property, lying in fact in a foreign country, but belonging to a person whose domicil at the time of his death was in Great Britain, cannot be dealt with by a representative in this

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* ["This case turns upon what is a common question in the courts of this country, whether this amounts to a conversion of the real property out and out into personalty, or whether it is to be considered as a direction to sell for the purpose of paying off certain charges, debts, and so on? That is the criterion by which questions of this sort are to be determined." (Per Lord Cottenham, *Williamson* v. *Advocate-General*, 10 Cl. & Fin. 18).]

altogether or by parcels, and at one time or at several times, and either by public auction or private contract, or partly by public auction and partly by private contract, as my said trustees or trustee, in their or his discretion, shall think fit, and to appoint, convey, assign, or otherwise assure the same, when sold, in such manner as the purchaser or purchasers thereof shall require. (*Power to make special conditions, &c.*, (52 d^3)).

—to invest proceeds of sale of realty;

52 f^3. And I direct my said trustees or trustee for the time being to invest the clear surplus of the monies to arise from or be produced by such sale or sales respectively, after paying, satisfying, deducting, and retaining all the costs, charges, and expenses of and incident to the execution of the trusts and powers hereby reposed in and given to them or him respectively, in their or his names or name, in the public stocks or funds of Great Britain, or at interest upon real security in England or Wales, and not in Ireland;

—power to vary investments;

With power for my said trustees or trustee, from time to time, to alter, vary, or transpose the same into or for other stocks, funds, or securities of the like nature, at their or his discretion.

—proceeds of sale of realty to be held on trusts declared of unconverted realty;

52 f^4. And I direct, that my said trustees or trustee for the time being shall stand and be possessed of and interested in the clear surplus of the monies to arise from or be produced by such sale or sales as aforesaid, and of the stocks, funds, and securities, in or upon which the same monies shall for the time being be invested, and the annual produce and income thereof, Upon and for such or the like trusts, ends, intents, and purposes, as are herein declared, expressed, or referred to, of and concerning the respective hereditaments which shall have been so sold, or as near thereto as circumstances will permit.

—power to grant mining, building, and improving leases;

52 f^5. And I direct and declare, that it shall be lawful for my said trustees or trustee for the time being, from time to time, to let and demise my said freehold, copyhold or cus-

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country without payment of the legacy duty; while, on the other hand, if the owner died in a foreign or colonial domicil, his property locally situate in this country, even though administered here and for the benefit of resident legatees or next of kin, is exempt from legacy duty," (though not from probate duty), has since been confirmed by the highest authority, in opposition to some earlier cases to the contrary. *Thompson* v. *Advocate-General*, 12 Cl. & Fin. 17.]

tomary and leasehold hereditaments, or such of them as for the time being shall not be sold under the discretionary power of sale hereinbefore contained, or any part or parts thereof, for mining, building, repairing, or improving purposes, for any term or terms of years, and for any consideration or considerations, either by way of fine, premium, rent, royalty, or otherwise, which they or he shall consider fair and adequate, or for cultivation, use, or occupation, at rack rent, either from year to year or for any term not exceeding twenty-one years from the time of letting, and with, under, and subject to such covenants and agreements as my said trustees or trustee shall think proper.

—to grant husbandry leases, &c.;

52*f*[6]. And I further direct and declare, that it shall be lawful for my said trustees or trustee for the time being, in their or his absolute discretion, at the costs of the said trust-premises, to repair, drain, improve, insure from fire, and manage the said freehold, copyhold or customary and leasehold hereditaments, or such of them as for the time being shall not be sold, and to adjust and determine in what proportion the expenses of draining or other improvements shall be borne by the capital and income of the said trust-premises respectively; And also to adjust, compound, and settle all accounts and claims respecting the same, and to make such allowances to tenants and others in relation thereto as they or he shall think just; And also to enter into the possession of or receive the rents and profits arising from my said copyhold or customary, as well as my said freehold and leasehold hereditaments, or such of them as for the time being shall not be sold. (*Receipt clause*, (52 *a*[11])).

—authority to repair, improve, and manage real estate;

—to settle accounts relating to real estates;

52*f*[7]. And I direct and declare, that my said freehold, copyhold or customary and leasehold hereditaments, or such of them as for the time being shall not be sold under the discretionary power of sale hereinbefore contained, shall be held, (*Trusts, either in detail or, as in the next clause, by reference to the trusts of the personalty*).

—trusts of unconverted realty;

52*f*[8]. Upon and for such or the like trusts, ends, intents, and purposes, as are herein declared, expressed, or contained of and concerning my residuary personal estate, or as near thereto as the respective tenures and natures of the said hereditaments will allow; And that the rents and profits from time to time to arise from or be produced by my said freehold, copyhold or customary and leasehold hereditaments, or such of them as for the time being shall not be sold, shall be held

—unconverted realty to be held on trusts of residuary personalty.

and applied upon such or the like trusts, and in such or the like manner, as if the same were part of the annual produce and income arising from my residuary personal estate.

(*Shorter form of discretionary trusts for conversion of residue*).

General residuary gift of realty and personalty to trustees;

—power to appoint freehold and copyhold;

—*discretionary* power to sell real estate;

—leasing power;

—power to manage real estate;

52 g^1. I GIVE all the real and personal estate which I have power to dispose of, and have not otherwise effectually disposed of (except mortgage and trust estates) (*a*), as to the freehold and customary parts thereof, To SUCH USES as [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor or other my trustees or trustee for the time being shall, at any time or times before the expiration of twenty-one years from the death of the survivor of my trustees herein named, by deed appoint; AND, subject thereto, and as to all my said residuary real and personal estates, except copyhold and customary hereditaments whereof the custom requires the tenant to be admitted, UNTO AND TO THE USE of my said trustees, their heirs, executors, administrators, and assigns respectively, UPON TRUST, if and when my trustees or trustee shall think fit (but not otherwise (*b*)), to sell all or any part or parts of the said freehold, customary, or leasehold hereditaments, together or in parcels, by auction or private contract, subject to any special stipulations as to biddings, title, evidence, time, expenses, compensation, indemnity, security for purchase-money, or otherwise, with power to buy in, or rescind or vary any contract relating to any hereditaments, and to resell the same.

52 g^2. AND ALSO, if and when my trustees or trustee think fit, from time to time to let any hereditaments, of whatever tenure, for mining, building, repairing, or improving purposes, for any term or terms of years and upon any consideration, and to let any hereditaments at rack-rent either from year to year, or for any absolute term or terms not exceeding twenty-one years from the time of letting (*c*), subject to a proviso for re-entry if the rent be twenty-one days in arrear; AND likewise, in the absolute discretion of my trustees or trustee, to

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(*a*) [This general devise will include all the real estate which is intended to be subject to the powers of selling and leasing, and to be vested in trustees. The subsequent dispositions of the beneficial interest may be either of shares in the whole as residue or of specific portions.]

(*b*) [This power is so expressed in order to avoid the legacy duty if no sale is made, vide ante, p. 612, n.]

(*c*) [This power authorises reversionary leases.]

repair, drain, improve, insure from fire, and manage the said hereditaments; AND to adjust, compound, and settle all accounts and claims respecting the same, and make such allowances in relation thereto as they or he shall think fit; AND to receive the rents of my copyhold and other hereditaments.

52 *g*[3]. AND to convert into money the residuary personal chattels and estate, in such manner and at such times as they or he shall think fit; WITH POWER to compound, release, waive, suspend, leave on personal or other security, refer to arbitration, or otherwise deal with any debts or claims which at any time or times may be owing to or be made on behalf of or against my estate, whether legally provable or enforceable or not.

—trust for conversion of personalty;
—power to compound and settle claims;

52 *g*[4]. AND to invest in the names or name of my trustees or trustee in the public stocks or funds, or on real security in England or Wales, and not in Ireland, [or on securities of any public company in Great Britain,] [or in the purchase of fully paid-up shares of any public company in Great Britain, paying a dividend,] any such trust-monies as for the time being shall not be required for any purpose under my will; WITH POWER from time to time to vary such investments.

—trust for investment, [power to invest on railway securities, &c.];

52 *g*[5]. AND I DECLARE, that my said trustees or trustee shall be seised and possessed of my said freehold, copyhold, and leasehold hereditaments, or such of them as shall not be sold, and the actual income therefrom, UPON TRUSTS corresponding as nearly as may be with the trusts herein expressed concerning my residuary personal estate and the investments thereof and the income from such investments; And shall be possessed of my residuary personal estate, and the produce of the sale of my real estate, and the investments thereof and the income therefrom, (*upon trust, &c.*)

—trust of unsold realty.

52 *h*[1]. I GIVE all my freehold and customary hereditaments, not otherwise effectually disposed of, (except trust estates), To SUCH USES as my trustees or trustee shall, at any time or times before the expiration of twenty-one years from the death of the survivor of my trustees herein named, by deed appoint; Subject thereto, I GIVE all my realty and personalty, not otherwise effectually disposed of (except copyhold or customary hereditaments, and mortgage and trust estates), unto and to the use of my said trustees, their heirs, executors, administrators, and assigns, IN TRUST, that my trustees or trustee will convert my leasehold and personal estate, and also, if they

Mixed residue in trust for sale; (*Very concise*);
—power to appoint copyholds;
—gift of residue (except copyholds) to trustees,
—for conversion and investment;

—*discretionary* power to sell realty;

—indemnity to purchasers;

—trustees may sell on credit;

—adjust claims, &c.;

—let and manage;

—receive rents of copyholds;

—apply rents as income;

—change investments;

—give receipts;

—realty to be held on trusts of personalty;

or he should think fit, my real estate, into money, to be invested in the funds or on mortgage of realty or personalty (*a*). I DECLARE, that my trustees or trustee may sell, at any time or times, in any manner and upon any terms in their or his absolute discretion, and as if they or he were absolute beneficial owners of all my residuary estate; AND that no purchaser shall see to the application of any purchase-money, or make any objection to anything my trustees or trustee shall do in or concerning any sale, on the ground of their or his fiduciary character; AND that my trustees or trustee may sell upon credit, and may adjust, settle, allow, compound, waive, suspend, take or give personal or other security for, or refer to arbitration, accounts relating to, and claims which may be made against or on behalf of, my estate, whether legally provable or enforceable or not; AND may let any unsold hereditaments, of whatever tenure, [but subject to any custom (*b*),] for mining, building, repairing, or improving purposes, for any period and on any terms, or at rack-rent from year to year, or for any term not exceeding twenty-one years from the time of letting (*c*); AND may drain, improve, insure, repair, cut and sell timber on, manage, and receive the rents of any unsold copyhold and other hereditaments, in person or by salaried bailiff or deputy, AND apply the rents of leasehold and other hereditaments as income of my residuary estate; AND may vary any investments of trust-monies; AND may, by written receipts, discharge all persons paying or transferring trust-monies or property from responsibility for the application thereof.

52 *h* [2]. AND shall hold my residuary real estate, and the actual income thereof, UPON TRUSTS corresponding as nearly as may be with the trusts of my residuary personal estate; AND shall hold my residuary personal estate, (*upon trust, &c., or substitute* (52 *h* [3])).

As to authorising loans on mortgages of personalty.

(*a*) [Mortgages of settled personal estate are often as safe, and in some cases safer, than mortgages of real estate. They are also generally effected and dealt with at less expense.]

(*b*) [These words are not material. The trustees must take care not to infringe the custom, whether specially enjoined or not.]

As to restrictions on trustees' power of leasing.

(*c*) [No other restrictions are placed on the power of leasing: such restrictions are proper when the power is given to a tenant for life, but are useless when given to a trustee to whose discretion matters of greater moment are unreservedly committed.]

52 *h*[3]. And shall hold my residuary real estate, Upon trust, [*trusts*]; And my said trustees or trustee shall hold my residuary personal estate, (*upon trust, &c.*) —variation where the trusts of realty are separately declared.

52 *i*[1]. And after the decease of the said [*tenant for life*], [*or*, And after the determination of the interests hereinbefore created in the said hereditaments,] Discretionary power to sell realty after death of tenant for life, &c.;

52 *i*[2]. I declare, that my trustees or trustee, if they or he should think fit, may sell the said hereditaments at any time or times, in any manner, and upon any terms, in their or his absolute discretion, and as if they or he were absolute beneficial owners thereof; And that no purchaser shall see to the application of any purchase-money or make any objection to anything my trustees or trustee shall do in or concerning any sale on the ground of their or his fiduciary character; And that my trustees or trustee may let any unsold hereditaments, of whatever tenure, [but subject to any custom,] for mining, building, repairing, or improving purposes, for any period and on any terms, or at rack-rent from year to year, or for any term not exceeding twenty-one years from the time of letting; And may drain, improve, insure from fire, repair, cut and sell timber on, manage and receive the rents of any unsold copyhold and other hereditaments, in person or by salaried bailiff or deputy, and apply the rents of leasehold and other hereditaments as income; [(*a*) And may invest any surplus proceeds of any sale, and also any other trust-monies under my will not immediately payable, in the funds or on mortgage of realty or personalty; And may vary any investments; And may, by written receipts, discharge all persons paying or transferring any trust-monies or property under my will from responsibility for the application thereof;] And shall hold the clear proceeds of any hereditaments so sold, upon trusts corresponding as nearly as may be with the trusts declared [of the said hereditaments], [*or*, of my residuary personal estate;] And shall hold the said hereditaments, if not sold, (*Trusts*).

—indemnity to purchasers;

—power to let and manage;

—to invest and change investments;

—to give discharges;

—trusts of proceeds of sale.

52 *k*[1]. I give all the real estate which at the time of my decease I shall have power to dispose of, To such uses as the said [*trustees*], or the survivors or survivor of them, or the Devise of real estate upon trust for absolute conversion; (*Short form*);

(*a*) [These general clauses may sometimes be more appropriately inserted in another part of the will.]

executors or administrators of such survivor, or other my trustees or trustee for the time being shall, before the end of twenty-one years from the death of such survivor, by any deed or deeds appoint; And, subject thereto, unto and to the use of the said [*trustees*], their heirs and assigns, for ever, UPON TRUST to apply the actual income therefrom until sold in the manner in which the income from the invested proceeds thereof would be applicable under the trusts hereinafter declared;

—trust for sale.

52 *k*[2]. AND UPON TRUST, that my said trustees or trustee will, as soon as shall be thought expedient, sell the same by auction or private contract, subject to such special conditions as they or he shall think fit, with liberty to buy in at any auction, and to rescind or vary any contract for sale, and to resell; AND I DECLARE, that no purchaser shall be responsible for the application of any purchase-monies paid to my trustees or trustee; AND I DECLARE, that my said trustees or trustee shall hold the proceeds of such sale or sales, after deducting the incidental expenses, (*upon trust &c.* (*a*)).

(*Realty and personalty on the same trusts.*)

General devise and appointment of residuary real estate to such uses as trustees shall appoint;

52 *l*[1]. I DEVISE AND APPOINT all the freehold, copyhold, and customary hereditaments over which I have or may have any disposing power, [and not otherwise effectually disposed of under my will,] To SUCH USES as my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, at any time or times before the expiration of twenty-one years from the death of the survivor of the several persons mentioned by name in my will shall by deed appoint; AND, subject thereto, I devise, bequeath, and appoint all the said hereditaments, (except copyhold and customary hereditaments, which I leave to descend to my heir (*b*), subject, nevertheless, to the control of my trustees and to the trusts of my will), and all the leasehold hereditaments and personal estate over which I have or may have any disposing power, UNTO AND TO THE USE of my said trustees, their heirs, executors, administrators, and assigns respectively, upon the trusts hereinafter declared.

—subject thereto, general devise and bequest to trustees, (except as to copyholds);

—discretionary

52 *l*[2]. I AUTHORISE my said trustees or trustee, at any time

(*a*) [The above short form of a devise of real estate to trustees for sale is substantially the same as the forms in common use, and may be adopted where simplicity is preferred to elaborate completeness.]

(*b*) [Vide ante, p. 604, n. (*a*).]

or times, if they or he should think fit, to sell all or any parts of my residuary real estates, [or of any estates subject to the trusts of my residuary estate,] together or in parcels, by public auction or private contract, subject to any special stipulations as to reserved biddings, time, title, evidence of title, conveyance, custody of deeds, expenses, compensation, indemnity, incumbrances, arbitration, security for purchase-money, or otherwise; With power to buy in or rescind or vary any contract relating to any such hereditaments, and to resell. —power to sell real estate;

52 *l*[3]. PROVIDED, that no real estate in which there shall be subsisting any life interest under my will or otherwise, or which shall be subject to any contingent or executory limitation, shall be sold without the concurrence of the person or persons entitled to such life-interest, or to the benefit of such contingent or executory limitation. AND that my said trustees or trustee may make such arrangements or bargains with such person or persons for procuring his, her, or their concurrence as my said trustees or trustee shall deem expedient (*a*). —reversionary estates, &c., not to be sold;

52 *l*[4]. I DIRECT, that the produce of such sales shall be held upon the trusts hereinafter declared concerning my residuary personal estate, and that my said residuary estates of inheritance, and the income therefrom, shall be held (subject to such discretionary power of sale) upon trusts corresponding as nearly as may be with the trusts of my residuary personal estate (*b*); And, in the administration of such trusts, I AUTHORISE my trustees or trustee, in their or his absolute discretion, to partition or allot such real estates or any of them among or to the respective actual or presumptive objects of the trusts, or any of such objects, in such manner, and charged or not with such sum or sums for equality of partition, as they or he shall think right. AND I AUTHORISE my said trustees or trustee from time to time to enter upon or receive the rents and profits of such copyhold hereditaments as for the time being shall be subject to the trusts of my will. —produce of sale and lands, until sold, to be held upon trusts of personal estate; —power to partition among cestuis que trusts;

52 *l*[5]. I DIRECT my said trustees or trustee to sell, get in, —direction to

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(*a*) [See other provisions as to reversionary property, post, pp. 623, 630, 640.]

(*b*) [The above trusts for conversion not only provide for such dealings with the property as circumstances may render expedient, but seem sufficient to protect the real estate from legacy duty. (Vide ante, p. 612).]

sell leaseholds and personalty;

and convert into money my leasehold hereditaments, [growing crops, farming stock,] and residuary personal estate, in such manner and at such times as they or he shall deem expedient; With full discretionary power to compound, release, give, or take real or personal security for, waive, suspend, refer to arbitration, or allow and settle, any debts or claims which may be owing to or from or be claimed or made on behalf of or against my estate, whether legally enforceable or not.

—produce of realty and personalty to be invested;

52 *l*[6]. And, after payment of my funeral, testamentary, and trust expenses, debts, and legacies [with the consent in writing of my said daughter [*name*], and after her decease with the like consent of my said daughter [*name*], and after the decease of the survivor of my said two daughters with the like consent of my said daughter [*name*], and after the decease of the survivor of my said three daughters, at the absolute discretion of my trustees or trustee], to invest such parts of my residuary personal estate as shall not be already so invested, and the produce of such real estates as shall be sold, in the public stocks or funds, or on mortgage of real or personal property, [*or*, on real security in England or Wales, and not in Ireland,] or in the purchase of freehold or copyhold hereditaments in England or Wales, in fee-simple or held upon renewable lease for lives or years or for an absolute unexpired term of not less than ninety years; And to make any such purchases under and subject to any such special stipulations as they and he are hereby authorised to use in selling any trust hereditaments; And, if they or he think fit, to waive any requisitions or objections which they or he may be entitled to insist on with reference to any hereditaments agreed to be purchased by them or him, and to accept any title, though the same be not strictly marketable; With power from time to time [with such consent or at such discretion as aforesaid] to vary any of the investments of my residuary real and personal estate.

—power to purchase lands;

—to buy under restrictive conditions, &c.;

—to vary investments;

—power to grant mining, building, and improving leases;

52 *l*[7]. And to drain, improve, insure from fire, repair, cut and sell timber on, and manage the said hereditaments, in person or by salaried bailiff or deputy; And to lease any hereditaments which shall be subject to the trusts of my residuary estate for any absolute term of years in possession, not exceeding twenty-one years, at a rack-rent; And to grant leases of any such hereditaments for mining, building, repairing, or improving purposes, of such durations, for such considerations by way of premium or rent, and upon such conditions, as they or he shall

deem expedient; And to join in any partition of any such hereditaments; And to exchange any of such hereditaments for any other hereditaments of the kind hereby authorised to be purchased; And to enfranchise or grant licenses to demise any copyhold or customary hereditaments held of any manor which shall be subject to the trusts of my residuary estate; And shall be seised and possessed of the hereditaments so to be taken in exchange, and of the fines, premiums, monies for equality of partition and exchange, and other gross sums to be received upon the exercise of any of the aforesaid powers, as part of my residuary estate.

—to partition or exchange;

—to enfranchise;

52 *l*[8]. But, as to such of my leasehold estates as at my decease shall be held for any unexpired term of less than ninety years, my said trustees or trustee shall, in their or his absolute discretion, estimate the probable permanent income which would be realised by a sale thereof and investment of the produce in the Consolidated Three Pounds per Centum Annuities, with liberty to vary such estimate from time to time as they or he shall see reason; And, until such estates are sold, shall apply so much of the rents and profits thereof as shall equal such estimated income, in such manner as if the same were income from the produce of such sale; And from time to time until such sale shall invest the surplus of such rents and profits, and the income from such investment, and add the same to the capital fund of my residuary estate. And, as to any reversionary estates not yielding a present income, my trustees or trustee shall, in their or his absolute discretion, estimate the probable permanent income which would be realised by a sale thereof and investment of the produce in the Three Pounds per Centum Consolidated Annuities, with liberty to vary such estimate from time to time as they or he shall see reason; And, until such estates are sold, shall, from time to time, out of any part of the capital of my said residuary estate, set apart to the credit of or actually raise and pay to the person or persons who would be entitled to receive such permanent income a sum or sums equivalent thereto, (*or, if such be the intention, substitute the next clause*).

—special direction as to income of leaseholds and as to reversions;

52 *l*[9]. And shall apply the income from my leasehold estates and other property (whatever may be the nature or duration of my estate or interest therein respectively) until sold, in such manner as if the same were income from the produce of such sale.

—actual income from unconverted property to be applied as such;

52 *l*[10]. And I declare, that my said trustees or trustee

—trusts of proceeds of residue.

shall be possessed of my residuary real and personal estate, and the produce thereof, upon the trusts hereinafter expressed.

Devise, on failure of prior gift, to trustees, in trust to sell and distribute.

52 *m*. And, on failure by any means of the disposition of the said hereditaments hereinbefore attempted, I DEVISE AND APPOINT the said hereditaments To SUCH USES as my trustees or trustee for the time being, at any time or times before the expiration of twenty-one years from the decease of the survivor of the several persons mentioned by name in my will, shall by deed appoint; And, subject thereto, I DEVISE AND APPOINT all such parts of the said hereditaments as are of freehold tenure Unto and To THE USE of my said trustees herein named, their heirs and assigns for ever. (*Trusts for conversion* (52 *d*[2]) *or* (52 *k*)).

General devise and appointment of real estates to such uses as trustees shall appoint;

52 *n*[1]. I DEVISE AND APPOINT all the hereditaments, of whatsoever tenure, in or over which I have or may have any beneficial interest or disposing power, [(including the hereditaments comprised in my marriage settlement),] To SUCH USES as my said trustees, or the survivors or survivor of them, or the executors and administrators of such survivor, or other my trustees or trustee for the time being, at any time or times before the expiration of twenty-one years from the decease of the survivor of the several persons mentioned by name in my will, [(*a*) but, during the life of my wife, with her concurrence, whether she be married or sole,] shall by deed appoint; And, subject thereto, To THE USE of my said wife during her life, for her separate use (*b*); And, after her decease, as to the said freehold hereditaments (*c*), To THE USE

—subject thereto, to wife for life, remainder (ex-

(*a*) [If the wife is one of the trustees, these words will not be required.]

(*b*) [The life estate is not given without impeachment of waste,—an immunity which is too often considered to be a matter of course in limitations of life estates.]

As to excluding copyholds from devise to trustees in remainder.

(*c*) [The copyholds are not devised to the trustees, because in some manors the fine in respect of the remainderman is exacted on the admission of the tenant for life; and though the same rule would probably apply to the case of a reversioner (i. e. the heir), yet, as the fine upon the admittance of several trustees, even in remainder (see *Richardson* v. *Kensitt*, 6 Scott, N. R., 419; and ante, p. 604), would be greater than that upon the admittance of an heir, a saving is effected by allowing the legal estate to descend on the heir.]

of my said trustees, their heirs and assigns for ever, upon the trusts hereinafter declared. —except as to copyholds) to trustees in fee;

52 *n* [2]. I DIRECT, that my said wife shall, during her life, keep the buildings on the hereditaments hereby devised to her in substantial repair and insured in some respectable office or offices of insurance against damage by fire, in the names or name of my said trustees or trustee, to the full value thereof; And that the monies to be received upon every such insurance shall be applied in reinstating the property in respect whereof the same shall become payable, And that, if my said wife should neglect to effect such repairs as aforesaid within six calendar months after being thereto requested in writing by my said [other] trustees or trustee, or to effect and keep on foot such insurance, or to produce to my said [other] trustees or trustee the receipt for the premium thereof upon demand or within fourteen days after the same shall have fallen due, it shall be lawful for (but not incumbent on) my said [other] trustees or trustee, out of any trust-monies in their or his hands or hand, to effect such repairs, or to effect or keep on foot such insurance, and to deduct the expenses thereof, with interest thereon at the rate of £5 per centum per annum, from any monies which shall then or afterwards be payable to my said wife, or to recover such expenses and interest, with all costs incidental to the recovery thereof, by distress or entry upon and perception of the rents and profits of all or any of the said hereditaments to which my said wife shall be entitled for life under my will. But so that no assignee or tenant of my said wife's life-interest in any part of the said hereditaments shall be answerable for or be damnified on account of any default of my said wife or of any other person in respect of any other part of the said hereditaments. —wife to repair and insure buildings; —on her neglect trustees may repair, &c.; —indemnity to tenants;

52 *n* [3]. I AUTHORISE my said wife at any time or times to lease all or any part or parts of the said hereditaments, at a rack-rent, for any term or terms of years not exceeding twenty-one years from the time of granting the same, or from year to year. —leasing power to wife;

52 *n* [4]. I AUTHORISE my said trustees or trustee, if and in case and at such time or times as they or he shall deem expedient, but not otherwise, after the decease of my said wife, or in her lifetime if she should join in passing her life estate therein under [either] my will [or my said marriage settlement,] (the price of such life estate to be held on the trusts of —discretionary power of sale of real estate after wife's death, or before, with her concurrence;

my residuary estate), to sell all or any part or parts of my said freehold, copyhold, and leasehold hereditaments, together or in parts, by public auction or private contract, subject to any special or other conditions as to reserved biddings, time, title, evidence of title, conveyance, custody of deeds, expenses, compensation, indemnity, incumbrances, arbitration, security for purchase-money, or otherwise; With power to buy in, or rescind or vary any contract relating to any of such hereditaments, and to resell; And to be possessed of the produce of such sale or sales, and in the meantime of the said hereditaments and the actual income therefrom, (which income, as to all the said hereditaments, as well copyhold as freehold or leasehold, I hereby empower them to receive after the decease of my wife, and to apply as if the same were income from my converted residuary estate), upon trusts corresponding with such of the trusts hereinafter declared concerning my residuary personal estate as shall then be capable of taking effect, and charged in aid of my personal estate with the payment of my debts and legacies. (*Specific and pecuniary legacies; Trusts for conversion of residuary personalty, and for investment.*)

—trustees may receive rents and profits;

—actual income of leaseholds to be applied as income;

—charge of debts and legacies.

52 *o.* I AUTHORISE my said trustees or trustee, if they or he should think fit, to sell the hereditaments at —— comprised in my marriage settlement, or any of them, during the life of my wife, either with her concurrence so as to pass her life-interest therein, (for which the income from the purchase-money shall be an equivalent to her), or without her concurrence and subject to her life-interest therein; PROVIDED, that, if the said hereditaments at —— be sold subject to the life estate therein of my said wife, she shall not be entitled to receive the income arising from the produce of such sale; but such income, and all the income to arise from the investment thereof, shall from time to time during her life be invested upon such securities as aforesaid, to be added at her decease to the capital of the produce of the said trust estates; And in case such accumulation should cease to be lawful, then and thenceforth the income which it shall not be lawful to accumulate shall be applied, under the trusts of my will, in the same manner as if my said wife were dead.

Power to sell subject to widow's life-interest under a settlement;

—if lands are so sold, she is not to receive the income from the produce;

—income, when accumulation ceases to be lawful, to be applied as if widow were dead.

52 *p* [1]. I GIVE, DEVISE, AND APPOINT [*parcels*] and all other the freehold and copyhold or customary manors, messuages, lands, tenements, and hereditaments, in or over which at the

(*Real estates to wife for life, then to be sold*);

time of my decease I shall have any devisable interest or disposing power, and not otherwise effectually devised, appropriated, or disposed of by my will, (except hereditaments vested in me as mortgagee or trustee merely), To SUCH USES as the said [*trustees*] or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, shall, at any time or times or from time to time, before the expiration of twenty-one years from the demise of the survivor of my said trustees herein named, by any deed or deeds direct, limit, or appoint, but during the life of my said wife not without her consent in writing; AND, in default of any such direction, limitation, or appointment, and in the meantime and subject to any such direction, limitation, or appointment, I GIVE, DEVISE, BEQUEATH, AND APPOINT all the freehold, copyhold or customary and leasehold manors, messuages, lands, tenements, and hereditaments, in or over which at the time of my decease I shall have any devisable interest or disposing power, and not otherwise effectually devised, bequeathed, or appointed by my will, (except hereditaments vested in me as mortgagee or trustee merely), UNTO AND TO THE USE of my said wife during her life, for her own use and benefit, and during any coverture for her sole and separate use, free from the control, debts, and engagements of any husband (*a*).

—devise of real estate to such uses as trustees shall, with wife's consent, if living, appoint;

—in default, to wife for life;

52*p*[2]. PROVIDED ALWAYS, AND I HEREBY DIRECT, that my said wife or her assigns shall, at her or their own expense, during her life, to the satisfaction of my [other] trustees or trustee for the time being, keep all the said messuages, lands, tenements, and hereditaments, to which she or they shall for the time being be entitled in possession under my will, (until the same shall be sold under the power hereinafter contained), in good, substantial, and tenantable repair, cultivation, order, and condition, in all respects, and managed according to the rules of good husbandry approved and practised in the neighbourhood thereof respectively; AND ALSO shall, during such time, keep all the insurable buildings, erections, and things fixed to the freehold, [and also all such things as at the

—wife to keep real estate in good cultivation, order, and repair;

—to insure;

(*a*) [The trustees having a power of appointment paramount the wife's life estate, can, with her concurrence in respect of her equitable interest, make a good title without the necessity of an acknowledgment by her under the Fines and Recoveries Act.]

time of my decease shall be fixed or attached to any of the said leasehold hereditaments hereby bequeathed to her for life, and shall come under the denomination of tenant's fixtures removable only during the tenancy,] insured from loss or damage by fire to the full value thereof respectively, in the names or name of my said trustees or trustee for the time being, in some respectable office or offices for insurance from fire, to be approved of by such trustees or trustee; And I DIRECT AND DECLARE, that the monies to be recovered under or by virtue of any such insurance shall be applied in reinstating the property in respect of the destruction or damage whereof the same shall be recovered or received; And I DIRECT AND DECLARE, that in case my said wife and her assigns should at any time or times neglect to keep the said messuages, lands, tenements, hereditaments, fixtures, and things, or any of them, in such repair, cultivation, order, and condition, and so managed and insured as aforesaid, it shall be lawful for, but not incumbent on, my said [other] trustees or trustee for the time being, with or out of any trust-monies which for the time being shall be in their or his hands, to supply or repair such neglect, default, or omission, in such manner and to such extent as they or he shall think proper; (but, as to any repairs of buildings, not without giving to my said wife or her assigns six calendar months' previous direction or notice to make such repairs); And further, that in case my said wife and her assigns should neglect to deliver to my said [other] trustees or trustee the receipt for any premium of insurance which ought to be paid for the purpose of insuring or keeping insured the said buildings, erections, and things, so directed to be insured, within ten days after the same premium shall first become payable, then it shall be lawful for, but not incumbent on, my said [other] trustees or trustee for the time being to effect or keep on foot such insurance; And I DECLARE that it shall be lawful for my said [other] trustees or trustee to deduct the expenses of so supplying or repairing any such neglect, default, or omission of my said wife and her assigns as aforesaid, together with interest thereon after the rate of £5 per centum per annum, from any monies which shall then or afterwards be payable to my said wife, or to recover such expenses and interest, with all costs incident to the recovery thereof, by distress or entry upon and perception of the rents and profits of all or any of the said messuages, lands, tenements, or hereditaments, to

—trustees may repair, &c., on wife's neglect,

—and deduct expenses from monies payable to wife, or recover them by distress;

which my said wife or her assigns shall be entitled for her life or otherwise under my will; But so, nevertheless, that no distress or entry shall be made upon any lands, tenements, or hereditaments, in the possession of an assignee, lessee, or tenant, to the damage or injury of such assignee, lessee, or tenant, for or in respect of any neglect, default, or omission committed, either before or after the commencement of his title or tenancy, with respect to any other hereditaments whereof he shall not be assignee, lessee, or tenant. —indemnity to tenants;

52 *p* [3]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for my said wife from time to time to demise or lease all or any part or parts of the said manors, messuages, lands, tenements, and hereditaments, to which she shall be entitled for life under my will, to any person or persons for any term or number of years in possession, so that there be reserved on every such demise, lease, or grant the best or most improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be demised, that can be reasonably had or gotten for the same, without taking any fine, premium, or foregift, or anything in the nature of a fine, premium, or foregift, for the making thereof, and so that there be contained in every such demise or lease a condition of re-entry for nonpayment of the rent or rents thereby to be respectively reserved, and so that the lessee or lessees be not exempted from punishment for committing waste. —power for wife to lease;

52 *p* [4]. AND, from and after the decease of my said wife, I GIVE, DEVISE, BEQUEATH, AND APPOINT all my said freehold and leasehold manors, messuages, lands, tenements, and hereditaments, but not my copyhold or customary hereditaments, (which I leave to descend to my heir, subject, nevertheless, to the foregoing power of appointment and to the trusts of my will and the control of my said trustees or trustee), and except hereditaments vested in me as mortgagee or trustee merely, UNTO AND TO THE USE of the said [*trustees, exclusive of wife, if she is appointed a trustee*], their heirs, executors, administrators, and assigns respectively, according to the respective tenures and natures thereof. —after wife's death, freeholds, copyholds, and leaseholds to trustees;

52 *p* [5]. AND I DECLARE, that the foregoing power of appointment is vested in my said trustees or trustee, and the said freehold and leasehold hereditaments are devised and bequeathed unto my said trustees, UPON THE TRUSTS hereinafter declared concerning the same; AND I HEREBY AUTHORISE AND EMPOWER my said trustees or trustee for the —discretionary power to sell after wife's death, and in her lifetime, with her consent;

time being, [if and in case they or he should deem it expedient to sell my said manors, messuages, lands, tenements, and hereditaments or any of them, but not otherwise,] either immediately after the decease of my said wife or at any time afterwards, as my said trustees or trustee for the time being shall deem expedient, or in the lifetime of my said wife with her consent in writing, to make sale and absolutely dispose of the said freehold, copyhold or customary and leasehold hereditaments and premises, [or any of them,] either altogether or by parcels, and at one time or at several times, and either by public auction or private contract, or partly by public auction and partly by private contract, as my said trustees or trustee in their or his discretion shall think fit; And to appoint, convey, assign, or otherwise assure the same, when sold, in such manner as the purchaser or purchasers thereof shall require.

—reversions not to be sold until they fall into possession, unless trustees think fit;

52 *p* [6]. But I direct and declare, that any reversionary estates or interests of which I may be seised or possessed (other than reversions to which a beneficial rent is incident) shall not be sold until the same respectively shall fall into possession, unless my said trustees or trustee for the time being shall think a prior sale expedient; And, for the purpose of accelerating or facilitating the sale of any such reversionary estate or interest, in case my said trustees or trustee should think it expedient to sell the same, I authorise and empower my said trustees or trustee to purchase the estate or estates, interest or interests, which shall be prior or precedent to such my estate or interest, upon such terms and conditions as they or he shall think fit, or to make any arrangement which they or he shall deem just for the sale of such prior or precedent estate or estates, interest or interests, together with my reversionary estate or interest, and for the apportionment or division of the proceeds thereof, or for the payment to the owner or owners of such prior or precedent estate or estates, interest or interests, of the income from such proceeds, or of an annuity or annuities in lieu thereof. (*Power to sell under special conditions, &c.*, (52 *d*); *payment of costs*, (52 *d*[4]); *trust to invest*, (52 *d*[6])).

—power to trustees to manage, let, &c.;

52 *p* [7]. And I direct and declare, that, from and after the decease of my said wife, and while, &c. (*power to manage, let, receive rents, &c.*, (52 *a*[8]), (52 *a*[9]); And I direct and declare that the rents and profits arising from the said freehold and copyhold, or customary and leasehold hereditaments,

from the time of the decease of my said wife until the sale thereof, &c. (*as in* (52 *a*[10]); *receipt clause*, (52 *a*[11]); *declaration of trust*, (52 *a*[12]).)

52 *p*[8]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that in case any of the said manors, messuages, lands, tenements, and hereditaments should be sold during the life of my said wife, the annual produce and income to arise from the investment of the purchase-monies for the same during the life of my said wife shall be paid to her for her sole and separate use and benefit.

—income from proceeds of sales during wife's life to be paid to her;

52 *p*[9]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for my said trustees or trustee for the time being [other than my said wife, and] without the necessity of obtaining the consent of my said wife, by sale or mortgage of any of my said manors, messuages, lands, tenements, and hereditaments, to raise any sum or sums of money for the purpose of paying my debts, [or any legacies given by my will or any codicil thereto,] (but not so as to exonerate my residuary personal estate therefrom) (*a*); AND I DECLARE, that all the powers, authorities, and directions hereinbefore contained with reference to the sale or sales hereinbefore authorised, shall extend and apply to any sale or sales to be so made for payment of my debts [or legacies]; And that it shall be lawful for my said trustees or trustee to give to any mortgagee or mortgagees any discretionary powers of sale and any other usual or reasonable powers and authorities.

—power to sell or mortgage in wife's lifetime for payment of debts [or legacies];

52 *q*. I DEVISE AND APPOINT all other the hereditaments, of whatsoever tenure, in or over which I may, at my decease, have any estate or interest or disposing power, To SUCH USES as my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, at any time or times before the expiration of twenty-one years from the death of the survivor of the persons herein mentioned by

General devise of realty, to such uses as trustees shall appoint; in default, to them in fee, (except as to copyholds, which are devised to the beneficial donee for life of the residue);

(*a*) [The words within parentheses are unnecessary, because a mere trust for sale for payment of debts or legacies does not exonerate the personalty; and they would be improper if the realty were given upon the same trusts as the personalty. As the trustees have dominion over the legal estate, a simple charge of debts on the real estate in the introductory part of the will would have the same effect as the above express power: *Ball* v. *Harris*, 4 Myl. & Cr. 264. See *Gosling* v. *Carter*, 1 Coll. 644.]

name, shall by deed appoint; And, subject thereto, I devise such of the same hereditaments as are of freehold tenure unto my said trustees, their heirs and assigns, upon the trusts hereinafter declared. Subject to the power aforesaid, I devise such of the said hereditaments as are of copyhold tenure, To the use of my wife during her life, but subject to the trusts hereinafter declared concerning my other real estates, and, to the extent of her beneficial interest under such trusts, for her separate use (*a*). (*Discretionary power to sell real estate*, (52 f^1) *to* (52 f^7); *bequest of personalty for conversion, trusts for investment, &c.*, (48 c^1) *to* (48 c^{10}); *trustees to be possessed in trust* (52 f^2)).

—copyholds to wife for life, (subject to trusts of residue);

—discretionary power of sale, &c.

Real estate and residue of personal estate for sale and conversion (*b*);

52 r^1. I devise unto and to the use of my said trustees all the real estate, and bequeath to them the residue of all the personal estate, to which I shall be entitled at my decease, Upon the trusts, and subject to the declarations following, namely, Upon trust to sell and convert into money my said trust estates, or such parts thereof as shall be of a saleable or convertible nature, and to get in the other parts thereof;

52 r^2. With full discretionary power to sell by public auction or private contract, together or in parcels, subject to such terms and conditions as to the title, or the evidence of title, or the time or mode of payment of the purchase-money, or indemnity against or apportionment of incumbrances, or as to any other matters relating to the sale, as my said trustees shall judge expedient; Also to fix reserved biddings, and buy in property offered for sale, and vacate or vary contracts for sale, and to resell without liability to answer for any consequential loss, and generally to effect the sale and conversion of my said trust estates on such terms and in such manner as they shall deem most advantageous.

—power to suspend conversion;

52 r^3. Also full discretionary power to suspend, for such period as my said trustees shall judge expedient, [*or*, so long as my said wife shall continue my widow, or as any child of mine, being a son, shall be under the age of twenty-one years, or,

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(*a*) [The object of this limitation is to avoid the admittance either of the trustees or of the heir, the widow being intended to take the residue for life, subject to a discretionary power of sale in the trustees.]

(*b*) [This form is taken from a precedent in Mr. Hayes's Introduction to Conveyancing, Vol. 2, p. 202.]

being a daughter, shall be under that age not having been married,] the sale, conversion, or getting in of my said trust estates, or any part or parts thereof respectively, [*or*, of such part or parts of my said trust estates as shall yield present income,] [*or*, of my said real trust estate, or any part or parts thereof, and of such part or parts of my personal trust estate as shall consist of investments in or upon any stocks, funds, or securities, British or foreign, real or personal, yielding present income.]

52 r^4. Also full discretionary power, during the suspense of the sale, conversion, or getting in of my said trust estates respectively, to manage and order all the affairs thereof, as regards letting, occupation, cultivation, repairs, insurance against fire, receipt of rents, indulgences and allowances to tenants, and all other matters, But so that no lease shall be granted otherwise than from year to year, or for a term not exceeding twenty-one years in possession, at the most improved rent, without fine or premium, [*or*, And, in the execution of this power of letting, to grant building, repairing, improving, or other leases, for such term or terms, at such rent or rents, and generally on such conditions, as my said trustees shall deem advantageous, either taking or not taking fines or premiums, which, if taken, shall be considered as sale-monies for the purposes of the trusts hereinafter contained]; Also full discretionary power to employ receivers, bailiffs, accountants, agents, and others, in or about the affairs of my said trust estates, with such salaries or remunerations as my said trustees shall think reasonable.

—interim management, letting;

—[special leasing power];

52 r^5. And I declare, that, for the purposes of enjoyment and transmission under the trusts hereinafter contained, my said trust estates shall be considered as money from the time of my decease, and that the rents, dividends, interest, and other yearly produce thereof respectively, to accrue due after my decease and until the actual sale, conversion, and getting in thereof, shall be deemed the annual income thereof, applicable, as such, for the purposes of the said trusts, without regard to the amount of such income or to the nature of the investment or investments yielding the same.

—constructive conversion from testator's death;

—rents, &c., to be deemed income;

52 r^6. And as to the monies to arise from the sale, conversion, and getting in of my said trust-estates, Upon trust thereout, in the first place, to pay or retain all the expenses incident to the execution of the preceding trusts and powers, also my debts and my funeral and testamentary expenses; and

—trusts of proceeds;

—expenses, debts, legacies, and annuities;

in the next place, to pay the pecuniary legacies hereinbefore bequeathed, and appropriate the funds hereinbefore directed to be appropriated for answering the annuities hereinbefore bequeathed, and in the meantime to pay the same annuities; And upon further trust to invest the ultimate surplus of the said trust-monies, in the names of my said trustees, in or upon permanent public stocks, funds, or securities of the United Kingdom, or on the security of a mortgage or mortgages of any freehold or copyhold [or leasehold] estates in England or Wales [and not elsewhere]; And from time to time, with the consent in writing of my said wife, until she shall die or marry, and afterwards in the discretion of my said trustees, to vary the investment or investments of my said trust-monies for any other or others of the description contemplated by this trust; (*Ulterior trusts. Power to compound debts, &c. to be inserted before the power to appoint new trustees*).

—investment of ultimate surplus;

Power to appropriate part of purchase-monies for indemnity of purchaser.

52 *s*. And I further direct, that it shall be lawful for my trustees or trustee for the time being to consent that all or any part of the monies to arise from any such sale or sales as aforesaid, shall be appropriated and set apart in the names or name either of my said trustees or trustee, or of any other trustees or trustee to be appointed for that purpose, for a given time, or till a given event, to be limited in that behalf, as an indemnity to the purchaser or purchasers of the said hereditaments respectively, and his, her, or their heirs, executors, administrators, appointees, or assigns, in such manner and upon such trusts as my said trustees or trustee for the time being shall in their, his, or her discretion think fit.

Residue and actual income to be held on trusts declared of produce (*a*).

52 *t*. I direct my said trustees or trustee to be possessed of my real and personal estates, and of the actual income therefrom until sold or realised, upon trusts corresponding as nearly as may be with the trusts hereinafter declared concerning the produce thereof and the income therefrom.

Trust of produce of residuary estate.

52 *u*. And I declare that my said trustees or trustee for the time being shall stand possessed of my said residuary per-

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(*a*) [This and some of the other forms in this collection are in substance repetitions of preceding ones; but, being expressed without any connection with or reference to the phraseology of what may have gone before, may be more conveniently adapted in particular cases.]

sonal estate, and of the monies arising therefrom, and also from the sale of my said real estate, after paying thereout my funeral, testamentary, and trust expenses, and just debts, and the pecuniary and other general legacies hereinbefore bequeathed, upon the trusts following(that is to say):

Trust for investment of produce of residue;

52 *v.* I DIRECT my said trustees or trustee, after payment of my funeral, testamentary, and trust expenses, debts, and legacies, to invest the produce of my said residuary real and personal estate, (and any other trust-monies not immediately applicable under my will), in the public stocks or funds, or on real securities in England or Wales, but not in Ireland, and to be possessed thereof upon the trusts hereinafter declared. I AUTHORISE my said trustees or trustee from time to time to vary the securities upon which any monies subject to the trusts of my will shall be invested, [but with the consent of my wife as to monies whereof the income is given to her.]

—power to vary securities [as to part with consent].

Trustees may let to purchaser of farming stock.

52 *w.* AND I AUTHORISE AND EMPOWER my said trustees or trustee, in selling my farming stock and crops or any part thereof, to agree with the purchaser or purchasers thereof to demise my said hereditaments or any part thereof to him or them for any term not exceeding —— years, at a fair rack-rent, and to demise the same accordingly under the power of leasing hereinbefore contained.

Property to be offered to son or sons before sale, at a valuation;

52 x^1. PROVIDED ALWAYS, that no sale shall be made of any part of my freehold, copyhold, customary, or leasehold estates, or of my farming stock, farming utensils, or crops, in the lifetime of any adult son or sons of mine, until my said trustees or trustee, or one of them, shall, by writing under their or his hands or hand, have offered to such son or to such sons successively (according to priority of birth), the option of purchasing the same or any part thereof, at a valuation to be made by a valuer appointed by my said trustees or trustee, (such valuation to be made, at the option of my said trustees or trustee, either before or after the making of such offer to my said son or sons), nor until such son or each of such sons shall have neglected to notify by writing under his hand to my said trustees or trustee, within fourteen days from the making of such offer, his acceptance thereof. PROVIDED, that no purchaser from my said trustees or trustee shall be affected by

—purchasers not to be affected by proviso

for pre-emption;

or be concerned to take notice of the power of pre-emption hereby given to such son or sons.

—variation containing an executory devise to son, if he should purchase the real estate.

52 x^2. PROVIDED ALWAYS, that, if my son, [*name*], should, within six calendar months from my decease, make a binding offer to my trustees or trustee, or one of them, to purchase all or any part or parts of my freehold, copyhold, customary, or leasehold estates, or of my farming stock, farming utensils, or crops, under such title as I may have therein at my decease, and at a valuation to be made by a valuer appointed by my said trustees or trustee, and should, within three calendar months from the making of such valuation, pay the amount of such valuation to my trustees or trustee, or, to their or his satisfaction, secure the payment thereof within two years, then I DEVISE AND BEQUEATH such hereditaments and other property as my said son shall so purchase, unto and to the use of him, his heirs, executors, administrators, and assigns, respectively, for his and their absolute use and benefit.

Power to lease furnished house until sold.

52 *y*. PROVIDED ALWAYS, that in case my said house in —— and my said house in —— should not be sold, it shall be lawful for my said trustees or trustee to demise and lease the same; And with respect to my said house in —— to demise or lease the furniture and other articles in or upon the same for such number of years, upon such terms, and in such manner as they or he shall judge for the benefit of the persons entitled to the same, under or by virtue of the trusts of my will; And the rent and annual income reserved or produced thereby shall be applied in the same manner as if the same were the annual produce and income arising from the investment of the proceeds of the sale of the said house or houses respectively, under the power and trusts herein contained.

Discretionary trust for sale [where annuities are charged on the realty]; (*Short form*);

52 z^1. I AUTHORISE my said trustees or trustee at any time or times, if they or he should think fit, to sell all or any parts of my said freehold, customary, and leasehold hereditaments, [either subject to or free from any annuity or annuities hereby charged thereon,] together or in parcels, by public auction or private contract, subject or not to any special or other stipulations as to biddings, title, evidence of title, compensation, indemnity, postponement of payment of and security for purchase-money, or otherwise; With power to buy in or re-

scind or vary any contract relating to any such hereditaments, and to re-sell the same.

52 z^2. I DIRECT, that the produce of such sales shall be held upon the trusts hereinafter declared concerning my residuary personal estate, And that my said freehold, customary, and leasehold estates [not otherwise disposed of by my will], and the income therefrom, shall be held (subject to such discretionary power of sale) upon trusts corresponding as nearly as may be with the trusts of my residuary personal estate. —produce of realty and income before sale to be on trusts declared of personalty.

53 *a*. AND I DIRECT that my said trustees or trustee shall apply the income arising from my freehold and copyhold or customary hereditaments, until sold, in such manner as if the same were income from the produce of any sale thereof; [And shall, in their or his absolute discretion, estimate the probable permanent income which would be realised by a sale of my leasehold hereditaments and an investment of the produce thereof in the Consolidated Three per Centum Annuities, with liberty to vary such estimate from time to time as they or he shall see reason; And, until such leaseholds are sold, shall apply so much of the rents and profits thereof as shall equal such estimated income in such manner as if the same were income from the produce of such sale; And shall, from time to time, until such sale, invest the surplus of such rents and profits, and the income from such investment, and add the same to the capital fund arising from the sale of my real estates.] [*Or, if such be the intention,* And shall apply the income from my freehold, copyhold or customary and leasehold hereditaments, until sold, (whatever may be the duration of my estate therein respectively), in such manner as if the same were income from the produce of such sale.] AND I DECLARE, that my said trustees or trustee shall be possessed of the said trust premises and the income therefrom. (*Ulterior trusts*). Intermediate profits of estates of inheritance directed to be sold to go as income; leaseholds to be considered as sold; —[*or*, actual produce of unconverted property to be applied as income.]

53 b^1. PROVIDED ALWAYS AND I DECLARE, that if it should appear to my said trustees or trustee to be expedient to delay or suspend the sale and conversion of any part of my real or personal estates under or by virtue of the trust or direction for sale and conversion hereinbefore contained, it shall be lawful for them so to do; Authority to postpone conversion;

53 b^2. AND in the meantime the annual produce and income actually arising from so much of the said real and personal —destination of income in the meantime;

estates as shall remain unconverted (*a*) shall go and be applied from the time of my decease in the same manner in all respects as the annual produce and income of the stocks, funds, and securities to be purchased with the proceeds thereof would have gone and been applicable under the trusts hereinbefore contained, in case such conversion had taken place and the proceeds thereof been converted as aforesaid. NEVERTHELESS I DECLARE, that my real estate shall for the purposes of transmission be absolutely impressed with the qualities of personalty from the time of my decease.

—real estate to be considered as personalty;

—lapsed interests in real estate directed to be sold to go to next of kin.

53 *b*[3]. PROVIDED ALSO, that in case any undivided share or other part or interest in the produce of my said real estate hereinbefore directed to be sold and converted, should lapse or otherwise fail to be effectually disposed of by my will, then I HEREBY DIRECT AND DECLARE, that such lapsed or undisposed-of share, part, or interest shall be deemed to be part of my personal estate undisposed of by my will, and shall go to and be distributed among such person or persons as would be entitled thereto, in case the same had been personal estate left by me undisposed of, and in the like shares and proportions (*b*).

Remarks upon the trustees' authority to delay the conversion of the trust property.

(*a*) The necessity for this clause appears from the doctrine discussed, ante, p. 230. The ordinary clause, enabling trustees to postpone the sale and conversion of trust property, and providing that the income in the meantime shall be paid to the persons who would be entitled to the income of the funds arising from the sale, is not adapted to some special cases, as where part of the property consists of a reversion, yielding no present income, or of a life annuity or a leasehold for a short term, yielding an undue proportion of income. In the two last-mentioned instances it is obvious that such a provision would place an unfair advantage in the hands of the person taking the immediate income. In such special cases some equitable mode of adjusting the relative claims of the immediate and ulterior takers must be sought for. One is for the testator to give the immediate taker, as an equivalent for the income of the proceeds of the sale, a fixed annuity, until the entire trust property is converted, as in the form. Another is to vest in the trustees a discretionary power to determine the amount of the equivalent, as in (53*f*). A third and more usual course is, to direct a valuation to be made of the reversion, annuity, or other such property, the conversion of which is suspended, and interest at a prescribed rate to be paid on the amount of such valuation, as in (53 *e*).

Destination of lapsed interest in realty di-

(*b*) [In *The Countess of Bristol* v. *Hungerford*, 2 Vern. 645, Sir J. Trevor, M.R., is reported to have decided, that a devise of real estate to be sold to pay debts, and the surplus to be deemed personal estate to go

53 *c.* And I hereby declare, that, notwithstanding the trust for sale and conversion hereinbefore contained, it shall be lawful for my said trustees or trustee to postpone and defer the sale and conversion of any part of my said real or personal estate for such period as to them or him shall seem expedient; And that until such sale and conversion, and until the money to be produced thereby shall be invested in the manner hereinafter directed, the income arising from the said real or personal estate shall be invested by my said trustees or trustee in augmentation of the principal or capital of the said trust-estate; And my said trustees or trustee, in lieu thereof, shall pay and allow to the person or persons who for the time being would be entitled to the annual produce of my residuary estate under the trusts hereinafter contained, if such sale and conversion and investment had actually taken place, the yearly sum of £——, to commence and be computed from the time of my decease, and to be payable in equal quarterly portions until my affairs shall be wound up and the clear net produce of my estate shall be placed out on security, pursuant to the trust hereinafter contained, with a proportional part, if required, to complete the period up to the time of such investment (*a*).

Authority to postpone conversion;

—actual income to be invested;

—annuity in lieu thereof.

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to the testator's executors, to whom he gave £20 apiece (which gift shewed that they were not to take the residue beneficially), did not deprive the heir of the surplus. But the report in Vernon is inaccurate, for it appears that the decision was in terms in favour of the next of kin, though, as they were also heirs, the point did not arise and could not have been debated. See 3 P. Wms. 194, n. In *Phillips* v. *Phillips*, 1 Myl. & K. 649, Sir J. Leach held the next of kin entitled to a lapsed legacy out of the produce of real estate directed to be sold and to be deemed part of the testator's personal estate. But this decision has never been approved of, and may now be considered to have been overruled. See *Cogan* v. *Stevens*, Lewin on Trusts, App. vii, 1 Beav. 482, n.; *Williams* v. *Williams*, 5 Law J., N. S., Ch. 84; *Henchman* v. *Attorney-General*, 3 Myl. & K. 485; *Johnson* v. *Woods*, 2 Beav. 409; *Gordon* v. *Atkinson*, 12 Jur. 810; *Fitch* v. *Weber*, 6 Hare, 150. And it is a settled rule, that nothing short of an actual gift to another can disinherit the heir; so that it is not sufficient to direct that the proceeds of the sale of the real estate "shall not in any manner lapse or result for the benefit of the heir-at-law:" *Fitch* v. *Weber*, 6 Hare, 145. But it is not to be inferred from that decision or from the prior cases, that the next of kin cannot in any case take an interest in the real estate by implication: 6 Hare, 154.]

rected to be sold.

Express gift necessary to entitle next of kin to lapsed interest in realty.

(*a*) Where a testator's property is extensively embarked in trade, or is, on any other account, so situated as to render it inconvenient to give

Direction concerning intermediate rents, (*applicable to a devise of specific estates*);

53 *d*[1]. And I further declare, that the rents and profits arising from the said trust-premises until the sale thereof as aforesaid, after paying thereout the expenses of repairs, insurance from fire, and management, shall from time to time be paid and applied to and for such and the same persons and purposes in all respects as the income arising from my residuary personal estate is hereby made payable and applicable to and for under the disposition thereof and the trusts concerning the same respectively hereinafter contained.

—realty to be considered as converted.

53 *d*[2]. And I further declare, that such part of the said freehold and copyhold hereditaments as from time to time shall remain unsold and unconverted, shall, from the time of my decease, be deemed to be of the nature of personal estate (*a*).

Unsold annuities and reversions to be valued, and interest on value paid in lieu of income.

53 *e*. (*Authority to suspend conversion*, (53 *b*[1]).) Provided always, that if any part of the trust-estate, the sale or conversion of which shall be suspended under the aforesaid power, should consist of life annuities or property held by lease determinable with any existing life or lives or for a term of years of which less than fifty years shall be unexpired at my decease, or should consist of reversionary interests which shall not yield or produce any immediate income, then I empower and direct my said trustees or trustee for the time being to cause an estimate to be made by some competent person or persons of the value of such property at the time of my decease [*or*, of such valuation] (*b*), and to pay to the person or persons who would have been entitled to the income arising from the proceeds thereof, if sold, interest at the rate of £4 per centum per annum on the amount of such valuation, to

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the legatees for life of the produce the actual income of the unconverted property, as in (53 *b*[2]), this seems to be the best mode of avoiding the difficulty.

(*a*) [Where the testator's wishes can be effected (as is frequently the case) without an absolute conversion of the real estate, it is better, for the sake of avoiding, or, at least, of not necessarily subjecting the real estate to the legacy duty, to give to the trustees a discretionary power of sale, as in the forms (52 *f*), (52 *g*), (52 *h*), (52 *i*), (52 *l*), (52 *m*), in which case, of course, the above declaration will not be inserted.]

(*b*) [In case of fluctuation of value, the value at the time nearest the time of conversion seems to be the proper measure of the income to be allowed.]

commence and be computed from the day or time of my decease, and to be payable half-yearly, so long as the conversion of the said property shall be suspended as aforesaid, with a proportional sum for any less period than a half-year.

53 *f*. And I further declare, that until my said residuary estate shall have been fully sold and converted, and the clear proceeds thereof invested under the powers and trusts hereinbefore contained, the actual annual and other produce and income therefrom shall be added to the capital thereof; And, in lieu of such annual produce and income, my said trustees or trustee shall from time to time raise out of my residuary estate and pay and apply as or in lieu of income of my residuary estate, under the trusts of my will, such an annual sum, to commence from my decease, as my said trustees or trustee shall, in their or his sole judgment, consider to be equal to the income which will be produced by the investment of the proceeds of my residuary estate when the same shall be converted; And I authorise my said trustees or trustee from time to time to revise and alter any such estimate, and increase or diminish such allowance for or in lieu of income accordingly.

Until conversion and investment of residue income to be accumulated,

and a fair allowance for income to be made by trustees.

53 *g*. As to such portion of my estate as shall at any time consist of leaseholds, annuities, reversions, or other property either of a perishable or increasing value, my wife and my infant and unmarried children shall be entitled only to interest on the actual value thereof as if the same were sold, and not to the annual produce thereof; Such value to be estimated by my trustees or trustee, in their or his absolute discretion, with power for them or him from time to time to vary such estimate; and such interest to be paid half-yearly, at the rate of four pounds per centum per annum, and to commence and be computed from the day of my decease.

Leaseholds, &c., to be considered as sold.

53 *h*. I declare, that my real estate, and such real estate as my trustees or trustee may hereafter purchase, shall be considered as real estate until the same be actually sold; And that it shall be in the option of my children, as they shall successively become entitled to receive their shares, to receive them out of the real or out of the personal estate of which my property shall then consist; for which purpose I

Real estate not to be considered as converted until sold;

—option to children to take as real or as personal estate.

authorise my trustees or trustee to value, or procure to be valued, my real estate, and to make such partition or allotment thereof as they or he shall think just; AND from the time when any child shall become entitled to receive his or her share, until the time when such child shall have declared such option, it shall not be lawful for my trustees or trustee to vary the nature and condition of my property without the consent of such child (*a*).

Authority to postpone the payment of legacies.

53 *k*. AND I FURTHER DIRECT AND DECLARE, that, if by reason of such suspension or delay as aforesaid in the exercise of the trust for sale and conversion hereinbefore contained, it should be found to be inconvenient to pay and discharge any one or more of the legacies hereinbefore bequeathed, when and as soon as they become due and payable, (other than and except the legacy of £—— given to my said wife, which is to be paid immediately and at all events), then, and in such case, I empower my executors and trustees for the time being to postpone the payment of such legacy or legacies respectively, (other than and except as aforesaid), for such period or periods not exceeding —— years from the time of my decease, as my said executors and trustees shall think proper, they paying from time to time, half-yearly, to the person or persons whose legacy or legacies respectively shall be so postponed, interest thereon at the rate of £4 per centum per annum during the period of such postponement.

Direction to executors to keep up testator's establishment for six months after his decease;

53 *l*. I DIRECT my said trustees or trustee to permit my wife to reside in and occupy my messuage, garden, and pleasure-grounds at ——, in which I now reside, for the period of six calendar months after my decease, and during such period, (whether my said wife should choose to reside in and occupy the said messuage and premises or not), to maintain and keep up the establishment there upon the same scale and in the same manner in all respects as the same shall have been ordinarily maintained and kept up previously to my decease; AND I DIRECT AND DECLARE, that the taxes and assessments payable in respect of the said messuage, garden, pleasure-

(*a*) [This clause might, perhaps, be sufficient to exempt the real estate from liability to legacy duty, even though actually sold.]

ground, and premises, wages of servants, expenses of housekeeping, gardening, and management, and all other charges and outgoings whatsoever incident to the maintenance of my establishment as aforesaid, shall be paid and defrayed out of my residuary personal estate; AND I DECLARE, that the expense of putting my servants into mourning, on the occasion of my decease, shall be considered as part of the charges of maintaining the said establishment.

—mourning for servants;

53 *n*. I AUTHORISE my trustees or trustee, in their or his discretion, to postpone for any time not exceeding four years from my decease the sale or letting of the house in which my family shall reside at my decease; AND I DECLARE, that, until the same shall be sold, my wife and children may reside therein and have the use of the garden and appurtenances; and that the rent and the water-rate, and all other rates and taxes in respect of the said house and premises, shall be paid by my trustees or trustee out of the income from my residuary estate.

—wife and children to occupy house until sold;

—outgoings charged on residue.

54 *a*. But, notwithstanding the trusts aforesaid, I authorise and request my said trustees or trustee during the minority of my said son, or for such shorter period as they or he shall think fit, to carry on my farming business, and for that purpose to retain unsold all or any of my real estates, and all or such parts as they or he shall think fit of my household furniture, plate, household linen, china, books, and other household effects, (including my fowling-piece, and other articles used by me for personal recreation), carriages, horses, saddles, harness, and other accoutrements, and my dairy and brewing utensils, implements of husbandry, crops, and live and dead stock; With full discretionary powers as to repairs, improvements, insurance, alteration, disposition and purchase of stock, employment of bailiffs, servants, and labourers, and their salaries, powers and authorities, and the extent of personal superintendence to be exercised by my said trustees or trustee. AND I DESIRE that my wife will assist my said trustees and trustee in the management of the said business; And that, while the same shall be carried on, the dwelling-house I shall occupy at my decease shall be kept, at the expense of my trust estate, as a residence for my wife and my said son. I AUTHORISE my said trustees or trustee, in their or his discretion, to postpone the payment of any legacy or legacies for any period, for the

Authority to carry on farming business, and retain farming stock, &c.;

—wife to assist in farming, and have house for residence;

—maintenance of wife and son out of profits.

purpose of better carrying on the said business. I DIRECT my trustees or trustee to apply, in the maintenance of my wife and the maintenance and education of my said son, such part of the clear profits of the said farm as they or he shall think fit, and to add any unapplied surplus thereof to the capital of my residuary personal estate.

Devise and appointment of real estate (subject to annuities) to trustees;

54 *b* [1]. AND, subject and charged as aforesaid, I GIVE, DEVISE, AND APPOINT all the freehold and copyhold or customary hereditaments to which at the time of my decease I shall be entitled in possession, remainder, reversion or expectancy, or in or over which I have a disposing power. To SUCH USES as the said [*trustees*], or the survivors, or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, shall at any time or times before the expiration of twenty-one years from the death of such survivor, by any deed or deeds appoint. AND, subject thereto, I GIVE, DEVISE, AND BEQUEATH all the said freehold hereditaments and all the leasehold hereditaments to which at the time of my decease I shall be entitled in possession, remainder, reversion, or expectancy, or in or over which I have or shall have any devisable interest or disposing power, unto and to the use of the said [*trustees*], their heirs, executors, administrators, and assigns respectively, according to the respective natures thereof, upon the trusts hereinafter expressed concerning the same.

—bequest of furniture, farming stock, &c., to trustees;

54 *b* [2]. AND I GIVE AND BEQUEATH all my household goods and furniture, plate and plated articles, household linen, books, china, and other household effects whatsoever (including my fowling-piece, and any other articles used by me for personal amusement or recreation), horses, saddles, harness, and other accoutrements, and also all my implements of husbandry, crops of corn and grain, and live and dead stock whatsoever, which shall be my property and in or about the messuage, farm, and hereditaments which I shall occupy at my death, unto the said [*trustees*], their executors, administrators, and assigns, upon the trusts hereinafter expressed concerning the same.

—heirs to hold copyholds on trusts of will;

54 *b* [3]. AND I DIRECT, that my heir (to whom I leave my copyhold or customary hereditaments to descend) shall be seised or possessed thereof subject to the trusts of my will and to the control and direction in all respects of my said trustees or trustee for the time being. AND I HEREBY

AUTHORISE AND EMPOWER my said trustees or trustee for the time being, from time to time, while my said copyhold or customary hereditaments shall be subject to the trusts of my will, to enter into and upon and cultivate, manage, let, or otherwise deal with the same, and to take and receive the rents and profits thereof (*a*). —power for trustees to enter and take rents of copyholds;

54 *b* [4]. AND I HEREBY DIRECT, that the said hereditaments, effects, and premises respectively hereinbefore devised and bequeathed to my said trustees, shall be held UPON TRUST, that they or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of this my will, will in the meantime and until my son, [*name*], shall attain the age of twenty-one years, or die, which shall first happen, if my said trustees or trustee should think fit so to do, but not otherwise, either by themselves or himself, or by any other person or persons to be employed by them or him, carry on the business of my said farm, With full power to cultivate, drain, improve, and manage the same in such manner as the said trustees or trustee shall think fit, and to sell and dispose of all or any part of the stock and produce of the said farm, and to purchase cattle and other articles to supply the place of the cattle and other articles which shall be sold from time to time as aforesaid, or which shall be necessary to carry on the business of my said farm, and with power to increase or diminish the stock thereof, and to employ such bailiffs and other servants and labourers as my said trustees or trustee for the time being shall see occasion, and at such salaries or wages and other privileges and allowances, and with such powers and authorities, and confidence or trust to be reposed in them or him respectively, as shall be deemed advisable or expedient. —declaration of trusts; —farming business to be carried on by the trustees until testator's son attains twenty-one;

54 *b* [5]. AND I DESIRE AND DIRECT, that my said wife shall aid and assist my said trustees and trustee in the carrying on and management of the business of the said farm; and that, during the time the said farm shall be carried on under the trusts aforesaid, the said messuage or tenement, with a suitable —wife to assist;

(*a*) [As the eldest son is intended to take the copyhold farm-lands, there is in this case a peculiar propriety in leaving them to descend to him, (vide ante, pp. 604, 624); and as to the effect of the above authority given to the trustees, which is involved in some obscurity, see p. 494.]

establishment, shall be kept at the expense of my trust estate, and for the purpose of providing a residence for my said wife and my said son, [*name*]. And I direct, that the profits which shall arise from my said farm during the time the same shall be so carried on as aforesaid, or a competent part thereof, after paying the costs of repairs and improvements and of insuring against fire, and other the charges and expenses to be incurred in the execution of the aforesaid trusts, shall be applied in the maintenance and support of my said wife, and the maintenance, support, and education of my said son, or otherwise for their respective benefit, in such manner and proportions as my said trustees and trustee shall think fit; and that, when and as often as there shall be any surplus money in the hands of my said trustees or trustee arising from such profits as shall not be wanted to carry on the business of my said farm, or for other the purposes aforesaid, the same shall fall into and be deemed a part of the residue of my personal estate, and be subject to the trusts and dispositions hereinafter declared of such residue.

—surplus profits to be applied for maintenance of wife, and maintenance and education of testator's son;

—residue to be deemed part of personal estate;

54 *b*[6]. And, subject and without prejudice to the trusts hereinbefore contained, [and to the annuities devised to or in trust for my said wife and sister, and the powers and remedies for enforcing the payment thereof respectively], I direct that my said trustees or trustee for the time being shall stand and be seised and possessed of all and singular the messuages or tenements, farms, lands, and other hereditaments hereinbefore devised and appointed, and of the said household furniture, effects, and premises hereinbefore bequeathed to them, and also of all such crops and live and dead stock and effects as shall be purchased from time to time in lieu or to supply the place of the stock or effects which shall be sold or otherwise disposed of, Upon the trusts following (namely), In case my said son, [*name*], should live to attain the age of twenty-one years, or should die under that age, leaving a child or children living at his death, then In trust for him my said son, [*name*], his heirs, executors, administrators and assigns absolutely: And, in case my said son should die before me, and any child or children of my said son should survive me and attain the age of twenty-one years or die under that age leaving issue, then In trust for such child or children of my said son, and, if more than one, in equal shares, and his, her, or their heirs, executors, administrators, and assigns

—real estate, (subject to annuities), farming stock, &c., to be held upon the trusts following:

—if son should attain twenty-one, or die leaving issue, in trust for him absolutely;

—substitution of son's children if he die before testator;

absolutely; But, if my said son should die under the age of twenty-one years and without leaving a child or children living at his death, or should die before me and no child of my said son should survive me and attain the age of twenty-one years, or die under that age leaving issue, then I DECLARE, that my said trustees or trustee for the time being shall stand and be seised of the said lands and other hereditaments so devised to them as aforesaid, UPON THE TRUSTS hereinafter mentioned; And then also, or in the event of my said trustees or trustee not thinking fit to carry on the business of my said farm, I DECLARE, that the said household goods and furniture, plate and plated articles, household linen, books, china, and other household effects, (including the articles hereinbefore referred to), and the implements, crops, and other live and dead stock upon or belonging to my said farms, shall fall into and be deemed a part of the residue of my personal estate, and be subject to the trusts hereinafter declared thereof.

—in case of son's death under twenty-one, and without leaving issue, or if trustees should not carry on farming business, the stock, furniture, &c., to fall into residue;

54 b^7. AND, with respect to the said messuages or tenements, farms, lands, and hereditaments, I HEREBY DIRECT, that the same shall be held by my said trustees and trustee, UPON TRUST, as soon as conveniently may be after such failure of the trusts thereof hereinbefore declared, absolutely to sell and dispose of the same and every part thereof, together or in parcels, at one time or at several times, either by public auction or private contract, or partly by public auction and partly by private contract, as my said trustees or trustee shall think fit; And to convey and assure the same, when sold, to the purchaser or purchasers thereof, his, her, or their heirs, executors, administrators, and assigns, or as he, she, or they shall direct. (*Authority to sell under special conditions, &c.* (52 r^2).)

—in case of son so dying, real estate to be sold;

54 b^8. AND, UPON FURTHER TRUST, by and out of the money to arise from such sale or sales as aforesaid, to pay the expenses attending the same, and any mortgage debt or debts which may have been created by my trustees under the power in that behalf hereinafter contained, (unless the said hereditaments shall have been sold subject to such mortgage or mortgages); And to lay out and invest the residue or surplus of such monies in or upon any of the public stocks or funds of Great Britain, or upon real securities in England or Wales; And from time to time to vary and change such securities, either as occasion shall require, or as my said trustees or trus-

—out of proceeds to pay debts and costs;

—to invest;

—power to vary investments;

—trusts of realty until sold;

tee shall think fit; And I declare, that the rents and profits of the said hereditaments, after the same shall become saleable, and in the meantime and until such sale shall be made, shall be held upon and for the same or the like trusts, intents, and purposes as are hereinafter expressed concerning the annual produce and income of the funds and securities in or upon which the monies to arise by or from such sale or sales are hereinbefore directed to be invested, and that my said trustees and trustee shall stand and be possessed of the said trust-monies, funds, and securities, and the dividends, interest, and annual produce thereof, upon the trusts and for the ends, intents, and purposes hereinafter declared concerning the same.

—purchasers and others not bound to see to the application of trust-monies;

54 *b*[9]. Provided always, and I expressly direct, that no person or persons who shall pay his, her, or their purchase-monies, or any other trust-money whatsoever, to my said trustees or trustee for the time being, shall be obliged or required to see to the application, or be answerable or accountable for the misapplication or nonapplication of the same money, or any part thereof, or for the regularity or propriety of any sale or transaction leading to such payment; [and that every receipt in writing which shall be given by such trustees or trustee shall be a good, valid, and sufficient acquittance and discharge for the sum or sums of money which therein or thereby respectively shall be acknowledged or expressed to have been received.]

—power to trustees, in case of their discontinuing the farm business, to assign and let lands;

54 *b*[10]. Provided always, and I hereby direct, that in case my said trustees or trustee for the time being should, at any time after my decease, and during the minority of my said son, deem it expedient to discontinue the business of my said farm, then I declare, that it shall be lawful for them or him to relinquish and give up, or otherwise to assign over or let my leasehold farm and hereditaments, and to let or grant any lease or leases of my said freehold and copyhold hereditaments, or any part thereof, either from year to year, or for any term or number of years not exceeding fourteen years in possession, and at the best improved yearly rent that can or may be obtained for the same, and under such covenants and agreements as they or he shall think proper. And I

—rents of farm to be applied in the same manner as profits;

further declare, that the rents and other profits of the said hereditaments shall, during the minority of my said son, be received and taken by my said trustees or trustee, and be ap-

plied and disposed of in the same manner as is herein directed concerning the profits to arise from my said farms, in case the same had been carried on as aforesaid.

54 *b*[11]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that in case the residue of my personal estate hereinafter bequeathed should be insufficient for the payment of my funeral and testamentary expenses and my just debts (including therein the mortgages upon my real estates), and the legacies hereinbefore given, it shall be lawful for my said trustees or trustee for the time being to raise and levy from time to time, by one or more mortgage or mortgages of the freehold and copyhold hereditaments hereinbefore devised and appointed, or any part thereof respectively (such mortgage or mortgages to be made either in fee or for any term or terms of years, and either with or without a power of sale in default of payment, and other usual or reasonable powers, clauses, and provisions), such sum or sums of money as my said trustees or trustee shall think proper to levy and raise for the purpose of paying the said expenses, debts, and legacies, or any of them, or such part or parts thereof as my said residuary personal estate shall be insufficient to satisfy, together with the costs and expenses attending or incident to the raising of the same, and to apply the money so to be raised in payment and satisfaction of such expenses, debts, legacies, and costs accordingly.

—power to mortgage real estate in aid of personalty, to pay debts, funeral and testamentary expenses and legacies;

54 *b*[12]. AND I EXPRESSLY DIRECT AND DECLARE, that the person or persons who shall advance any sum or sums of money upon the security of any mortgage or mortgages of the hereditaments aforesaid, or of any part thereof, shall not be obliged or required to see to the application, or to be answerable or accountable for the misapplication or nonapplication of the same money, or of any part of the same, or to ascertain or inquire whether such mortgage or mortgages is or are necessary or proper for the purposes aforesaid or any of them, or into the sufficiency or insufficiency of my personal estate for the payment of the same, [it being my intention that such mortgage or mortgages shall be left absolutely to the discretion of my said trustees or trustee for the time being; and that their or his receipts shall, to all intents, effects, and purposes, be good and sufficient discharges for the money which therein or thereby respectively shall be acknowledged or expressed to be or to have been received.]

—mortgagee not to be bound to see to the application of mortgage money,

or to ascertain the propriety of any mortgage;

54 *b*[13]. PROVIDED ALWAYS, that in case the annuities so hereinbefore made payable out of my freehold, copyhold, and

—special provision in case estates should

be sold while annuities are subsisting;

leasehold hereditaments, or either of them, should be subsisting when the hereditaments charged therewith shall become saleable under the trusts aforesaid, such hereditaments, or any part or parts thereof, shall or may be sold either subject to or free and discharged from the said annuities or annuity, as my said trustees or trustee for the time being shall think proper; And in case the said hereditaments or any part or parts thereof should be sold free and discharged therefrom, the said annuities or annuity respectively, and the powers and remedies hereinbefore reserved for enforcing the payment thereof, shall, immediately on the execution of the conveyance and assurance of the said hereditaments so sold and conveyed, or otherwise according to the tenor and effect thereof, cease to be payable out of and charged upon, or in any manner to affect, the said hereditaments so sold and conveyed; And the same annuities or annuity shall from time to time thenceforth be charged upon and payable out of the hereditaments (if any) remaining unsold, and shall also be charged upon and payable out of the dividends, interest, and annual produce arising from the securities upon which the proceeds of such sale shall be invested; or, in the option of the person or persons beneficially entitled to such annuities or annuity respectively, and notwithstanding the coverture of such person or persons, a separate and distinct investment shall be made in the public stocks or funds, or on real security as aforesaid, of an adequate portion of the monies arising from such sale or sales, for the purpose of securing the same annuities or annuity, in the joint names of my said trustees or trustee for the time being, and of some person to be nominated by such annuitant, or, if more than one annuity should be then subsisting, then of two persons, one to be nominated by each annuitant, Upon trust, in the first place, out of the annual income of such invested fund, to pay the said annuities or annuity, and, when and as the same respectively shall determine, to transfer the said funds and securities to the trustees or trustee for the time being of my will, upon the trusts and for the intents and purposes hereinbefore expressed concerning the same. But I expressly direct and declare, that it shall not be incumbent on any person or persons who may happen to purchase the said hereditaments or any part thereof, discharged from the said annuities or annuity, to see that any such investment or investments as aforesaid is or are made.

—lands may be sold free from annuities, and the purchase-monies shall be charged;

—annuitants may consent to appropriation of a fund;

54 *b* [14]. And I further declare, that in case my said trustees or trustee should, under the power in that behalf hereinbefore contained, make any mortgage or mortgages of my said real estate, or any part or parts thereof, the mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, shall and may hold the said hereditaments free and discharged of and from the said annuities hereby charged thereon; Provided nevertheless, that, as between the persons claiming the said real estate under this my will, the said annuities or annuity shall be and be deemed to be a subsisting and continuing charge thereon. And I further declare, that this present provision shall apply, although such mortgage or mortgages should be created for the purpose of paying any of the pecuniary legacies hereby bequeathed, it being my intention that such legatees shall take precedence of the annuitants in regard to their several claims upon the said estates (*a*).

—provision in regard to annuities, in case they are subsisting when mortgage is created;

54 *b* [15]. Provided always, that, if my said trustees or trustee should deem it disadvantageous or inexpedient to proceed to sell and convert my trust estate at the time or times hereinbefore prescribed or mentioned for the sale and conversion thereof, it shall be lawful for my said trustees or trustee to suspend such sale and conversion, in respect of the whole or any part of such estate, so long as they or he shall think proper; Nevertheless, I declare, that the same shall be absolutely impressed with the qualities of personal estate for the purposes of transmission, at the period when the same shall become saleable or convertible under the trusts aforesaid (*b*). (*Power to suspend enforcement of claims, &c.* (48 *c* [3]) *or* (48 *c* [4])).

—authority to delay conversion;

—realty to be considered as personalty;

54 *b* [16]. And I further empower my said trustees or trustee, in the exercise of the trust for sale hereinbefore contained, or in the course of their management and carrying on of the business of the said farm as aforesaid, to sell any part of the stock or trust property upon credit.

—power to sell upon credit;

(*a*) All these points require to be expressed in order to prevent dispute.

(*b*) It is clear that real estate, absolutely directed to be sold, is transmissible, from the prescribed period of conversion, as personal estate; but where a discretion is vested in trustees to suspend or delay the conversion, it may be a question whether the character of personalty is, during the suspension, impressed on it: to exclude any such question the present clause is added.

—power to purchase any part of trust estate.

54 b^{17}. And I declare, that my said trustees or trustee for the time being, or any of them, shall be competent to purchase any part of my trust estate, either at any public auction or from a co-trustee or co-trustees by private contract, any rule of equity to the contrary notwithstanding.

TRUSTS OF SPECIFIC OR RESIDUARY FUNDS OF PERSONALTY.

Income to wife, during her widowhood (*a*);

55 a^1. (*Trusts for conversion and investment,* (52 r^1) *to* (52 r^6)). —And upon further trust, to permit and empower my said wife to receive the annual income of my said trust-monies, or the stocks, funds, and securities whereon the same shall be invested as aforesaid, (which monies, stocks, funds, and securities are hereinafter referred to under the denomination of "the said trust-fund,") during her life, if she shall so long continue my widow, she thereout maintaining, educating, and bringing up such of my sons as shall, for the time being, be under the age of twenty-one years, and such of my daughters as shall, for the time being, be under that age, not having been married, in a manner suitable to their station in life; And immediately after her decease or future marriage, As to as well the capital as the annual income of the said trust-fund—

—charged with maintenance, &c., of children;

—capital to children, equally;

55 a^2. In trust for my child, if only one, or all my children, if more than one, who, either before or after the decease or future marriage of my said wife, shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry, and, if more than one, to take in equal shares.

—settlement of the shares of daughters;

55 a^3. But I declare, that if such child or children, or any of them, shall be a daughter or daughters, then [one moiety of] the said trust-fund or [of] the share thereof to which such daughter or each of such daughters shall become entitled, shall be held by the said trustees upon the trusts following, namely: Upon trust, with the consent in writing of my daughter entitled thereto, and, after her decease, in the discretion of my said trustees, to convert the same into money, and invest the monies to arise therefrom in or upon any of the

—investment;

(*a*) [This form is taken from a precedent of a will in Mr. Hayes's Introduction to Conveyancing, Vol. 2, p. 210.]

permanent public stocks, funds, or securities of the United Kingdom, or on the security of any mortgage or mortgages of freehold or copyhold [or leasehold] estates in England or Wales, [and not elsewhere,] and from time to time, with the like consent or in the like discretion, to vary the investment or investments of the same monies for any other or others of the description contemplated by this trust.

—inalienable life-interest;

55 *a*[4]. And upon further trust, to pay the annual income of the same monies, or the stocks, funds, and securities whereon the same shall be invested as last aforesaid, (and which monies, stocks, funds, and securities are hereinafter referred to under the denomination of "the said settled fund"), as and when the same shall from time to time become actually receivable, and not by way of anticipation, into the proper hands of my same daughter, for her separate use, free from marital control, as a strictly personal and inalienable provision, during her life, unless she, being discovert, shall do or suffer any act, matter, or thing, whereby, notwithstanding the restriction or anticipation hereinbefore imposed, the same income, or any part thereof, shall either voluntarily or involuntarily be aliened or incumbered, and for which annual income the receipts of my same daughter shall alone be discharges to my said trustees; But if she, being discovert, shall do or suffer any such act, matter, or thing, as aforesaid, then immediately after the doing or suffering thereof, As to the annual income of the said settled fund, to accrue during the remainder of her life, Upon such trust or trusts, and subject to such restrictions and declarations, in favour or for the benefit of my same daughter (*a*) as the said trustees shall, by any deed or deeds, to be made with or without power of revocation and new appointment, appoint, And in default of such appointment, and subject to any partial appointment, to pay or apply the same in such manner as the same would, by virtue of the trusts hereinafter contained, be payable or applicable if my same daughter were actually dead (*b*), (*or use the form* (55 *a*[5])).

—proviso for cesser on alienation;

(*a*) [This power seems to be incapable of operating with the effect intended, see ante, pp. 486, 548, 550.]

(*b*) This form of trust, which is framed agreeably to the old practice, does not provide against alienation during *discoverture*.

—inalienable life-interest, (*another form*);

55 *a* [5]. Upon trust, to pay the annual income of the same monies, or the stocks, funds, and securities whereon the same shall be invested as last aforesaid, (and which monies, stocks, funds, and securities are hereinafter referred to under the denomination of "the said settled fund"), as and when the same shall from time to time become actually receivable, and not by way of anticipation, into the proper hands of my same daughter, during her life, for her separate use, free from the control of any husband whom she may marry, without power of alienation, as a strictly personal provision, and for which annual income her receipts shall alone be sufficient discharges to my said trustees; And immediately after the decease of my same daughter, As to as well the capital of the said settled fund, as the annual income thenceforth to accrue due for the same,

—children and other issue of daughter, as she shall appoint;

55 *a* [6]. In trust for all or any one or more of the children or remoter issue of my same daughter, (such remoter issue being born in her lifetime), in such proportions, for such interests, and generally in such manner as she, whether covert or sole, shall by any deed, with or without power of revocation and new appointment, or by her will, executed and attested according to the statute for the amendment of the laws with respect to wills, appoint;

—hotchpot;

55 *a* [7]. But no child, in whose favour an appointment shall be made, shall participate, under the trust next hereinafter contained, in the unappointed portion of the said settled fund, without bringing the benefit of such appointment into hotchpot; And in default of appointment, and subject to any partial appointment,

—in default to children equally;

55 *a* [8]. In trust for the child, if only one, or all the children, if more than one, of my same daughter, who, either before or after her decease, shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry, such children, if more than one, to take in equal shares; But if no child of my same daughter, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then,

—as daughter shall by will appoint;

55 *a* [9]. In trust for such persons, for such interests, and generally in such manner in all respects as my same daughter, whether covert or sole, shall by will, executed and attested in manner prescribed by the statute for the amendment of the laws with respect to wills, appoint; And in default of appoint-

ment, and subject to any partial appointment, IN TRUST for the person or persons who, at the decease of my same daughter, shall be of her blood and of kin to her, and who, under the statutes for the distribution of intestates' effects, would be entitled to her personal estate if she were dead a spinster and intestate, such persons, if more than one, to take in the proportions prescribed by the same statutes. —in default to daughter's next of kin;

55 *a*[10]. AND I EMPOWER my same daughter, notwithstanding the trusts herein contained subsequently to the trust in her own favour, by deed, executed either after or in contemplation of her marriage, or by will, executed and attested according to the statute for the amendment of the laws with respect to wills, to appoint the annual income, to accrue due after her decease, of the said settled fund, or any part of such income, to and for the life of any husband of the same daughter who shall survive her, [and who, in contemplation of his marriage with her, shall concur in effectually securing to her the separate and inalienable enjoyment of the annual income of the said settled fund during her coverture by him.] —daughter empowered to appoint a life interest to a husband;

55 *a*[11]. I EMPOWER my said trustees, during the minority of each child of mine, to apply such part as they shall think fit of the annual income of the fund or share to which such child shall be entitled or contingently entitled, in or towards the maintenance and education or otherwise for the benefit of the same child; And I DIRECT them to accumulate, by investments, pursuant to the trust for investment hereinbefore contained, the unapplied surplus (if any) of such income, and I DECLARE that the accumulations thereof shall be liable to be in like manner applied, but, subject to such liability, shall be added as capital to the fund or share whence the same shall have arisen. —maintenance of testator's children; —accumulation;

55 *a*[12]. I ALSO EMPOWER my trustees, with the consent of my said wife during her widowhood, and after her decease or marriage, in their discretion, at any time or from time to time to apply any part or parts, not exceeding in the whole one moiety [*or*, one third part, *or*, not exceeding in the whole the amount or value of £—— sterling] of the capital of the fund or share to which each or any child of mine shall be entitled or contingently entitled, in or towards the advancement in life or otherwise for the benefit of the same child, whether such child shall be a son or daughter or shall be under the age of twenty-one years or not. —advancement;

—maintenance of daughter's issue;

55 *a*[13]. I ALSO EMPOWER my said trustees to apply all or any part of the annual income of the share or shares to which each or any infant child or issue of each or any daughter of mine shall be entitled or contingently entitled in possession by virtue of any appointment or appointments or otherwise under the trusts aforesaid (unless such appointment or appointments shall otherwise direct) in or towards the maintenance and education or otherwise for the benefit of such child or issue; And I DIRECT my said trustees to accumulate, by such investments as aforesaid, the unapplied surplus (if any) of such income, and declare that the accumulations thereof shall be liable to be in like manner applied, but, subject to such liability, shall be added as capital to the share or respective shares whence the same shall have arisen.

—advancement of daughter's issue;

55 *a*[14]. I ALSO EMPOWER my said trustees to apply any part or parts, not exceeding one moiety, of the capital of the share to which each or any child or issue, whether under the age of twenty-one years or not, of each or any daughter of mine shall be entitled as aforesaid, unless otherwise directed as aforesaid, in or towards the advancement in life or otherwise for the benefit of such child or issue; But no such application as last aforesaid shall be made during the life of my same daughter without her previous consent in writing, nor, after her decease, to the prejudice of the life-interest of any husband in whose favour an appointment shall have been made by her, under the power for that purpose hereinbefore contained, without his like consent.

—substitution of grandchildren for children of testator pre-deceasing him;

55 *a*[15]. I DECLARE, that if any son or daughter of mine shall die in my lifetime, and any child or children of such son or daughter shall be living at my decease, then the said trust-fund, or the share thereof, to which the son, or each son, so dying, would, if living at my decease, and if then of the age of twenty-one years, or to which the daughter, or each daughter, so dying, would, if living at my decease, have been entitled under the trusts aforesaid, shall be held by my said trustees upon such trusts, and subject to such provisions in favour of the child or children of such son or daughter, respectively, as the same would have been held, if, as regards a son so dying, such son were a daughter and had died immediately after my decease, or, as regards a daughter so dying, such daughter had died immediately after my decease.

55 a^{16}. But in case no child or other issue of mine shall acquire an absolutely vested interest in the said trust-fund by virtue of my will, then, as to the same trust-fund, In trust for such persons, for such interests, and generally in such manner as my said wife, she continuing my widow at her decease, shall by her will, executed and attested according to the statute for the amendment of the laws with respect to wills, appoint; and in default of appointment, and subject to any partial appointment or appointments,

—on failure of previous trusts;

—as testator's wife shall by will appoint;

55 a^{17}. In trust for the person or persons who, at the decease or future marriage of my said wife, shall be of my blood and of kin to me, and who, under the statutes for the distribution of the personal effects of intestates, would be entitled to my personal estate if I were to die immediately after the decease or marriage of my said widow, such persons, if more than one, to take in the proportions prescribed by the same statutes.

—for testator's next of kin.

55 b^{1}. Upon trust, from time to time, to pay to, or authorise and empower, permit, and suffer my said wife to receive the annual produce and income thereof to and for her own use and benefit during her life; and from and after her decease,

In trust for wife for life;

55 b^{2}. To stand possessed of and interested in the said trust-monies, funds, and securities, In trust for all and every my children who shall be living at the time of the decease of my said wife, and the issue then living of such of them as shall have died in the lifetime of my said wife (*a*), or some one or more of such children and issue respectively, in such shares and proportions, and to be paid or transferred at such time or respective times after the decease of my said wife, and subject to, with, and under such conditions and limitations over (such conditions and limitations over being for the benefit of some or one of my said children, or of the issue of such deceased child or children), and in such manner as my said wife (being sole and unmarried) shall, [by any deed or deeds, with or without power of revocation and new appointment, or] by her last will and testament in writing, or any testamentary writing, direct, limit, or appoint; And in default of such direction, limitation, or appointment, or in case of the cesser or determination of the said power of appointment,

—after her death, for such children living at her decease, and issue of deceased children, as she shall by deed or will appoint;

—in default of appointment, in trust for all testator's chil-

(*a*) In general, it is better that these powers should authorise an appointment to the issue of children living and dead. See p. 535, n.

dren living at wife's decease, and the children of those dying before her, per stirpes;

or any appointment or appointments to be made in pursuance thereof, under the proviso for that purpose hereinafter contained, and as to any part or parts of or interest in the said trust-monies, funds, and securities, which shall not be effectually appointed,

55 *b* [3]. In trust for all and every my children or child who shall be living at the decease of my said wife (*a*), equally to be divided between or among them, if more than one, share and share alike, and the child or children then living of such of the said children (if any) as shall have died in the lifetime of my said wife. But I direct, that the child or children of each such deceased child shall be only entitled to the share which his, her, or their deceased parent would have been entitled to if living at the decease of my said wife; And that the share which shall belong to the child or children of each such deceased child shall be equally divided between or among such children, if more than one, share and share alike, and if there should be only one child, then such share shall wholly belong to such only child. (*Hotchpot clause* (55 *h* [4])).

—maintenance of infant children and grandchildren after wife's death;

55 *b* [4]. And I hereby direct, that in case any such child or grandchild who shall be entitled as aforesaid should be under the age of twenty-one years at the time of the decease of my said wife, the annual produce and income of the share of each such child or grandchild of and in the said trust-monies, funds, and securities, under or by virtue of the trusts here inbefore contained, shall be applied for or towards his or her maintenance, support, and education during his or her minority.

—if no child or grandchild, then for such persons as wife shall by will appoint;

55 *b* [5]. And in case there should be no such child or grandchild living at the decease of my said wife, then as to the said trust-monies, funds, and securities, Upon such trusts, for the benefit of such person or persons, and to and for such ends, intents, and purposes, and in such manner and form as my said wife shall, at any time or times, while sole, by any deed or deeds revocable or irrevocable, or, whether sole or covert, by her last will and testament or any testamentary writing, direct, limit, or appoint. And in default of any such direction, limitation, or appointment, or as to any part or parts of or interest in the said trust-monies, funds, and securities which shall not be so effectually appointed, In trust for the execu-

(*a*) [As to the policy of making the vesting depend upon surviving the tenant for life see p. 536, n.]

tors or administrators of my said wife, to be administered as part of her personal estate.

55 *b*[6]. PROVIDED NEVERTHELESS, AND I DECLARE, that in case my said wife should happen to marry after my decease, then, and in such case, the power of appointment to or among my children or other issue hereinbefore reserved to her in respect of the residue of my personal estate (*a*), and any appointment or appointments which shall have been made in pursuance thereof, shall, from and after such her marriage, cease and determine.

—in default of appointment, in trust for her executors or administrators;

—in case wife marries, power of appointment to cease;

55 *b*[7]. AND I FURTHER DECLARE, that in case my said trustees or trustee for the time being of this my will should deem it to be unnecessary and inexpedient to apply to and for the maintenance, education, and support of any minor, the whole of the annual income which, by virtue of the trusts aforesaid, is made applicable to such purpose, then and in every such case my said trustees or trustee shall apply in and to such maintenance, education, and support, so much only of the said annual income as they or he shall deem adequate and proper for the purpose; And shall from time to time invest in their or his own names or name the residue or unapplied part of the said annual income; and the monies so invested and accumulated as aforesaid shall from time to time be added to and follow the destination of the capital or principal of the fund whence the same shall have arisen, and shall be subject to all the trusts and provisions herein expressed concerning the same; Nevertheless, I hereby DECLARE, that, as well the principal as the income of such accumulated fund or of any share therein shall be and remain applicable, notwithstanding the investment thereof, to the maintenance, education, and support of the minor or minors, who for the time being shall be presumptively or actually entitled to such accumulated fund or shares (*b*).

—discretionary power to trustees to regulate amount of maintenance;

—unapplied income to be accumulated;

—power to apply accumulations;

(*a*) It will be observed, that the wife's power of appointment over the residue is confined to appointments by *will*. Such a provision as that in the text, indeed, would only be proper where the power is testamentary, as an appointment by deed ought not to be liable to be defeated by subsequent circumstances affecting the personal situation of the donee.

(*b*) [The power usually runs thus:—

"of the minor from whose share or presumptive or expectant share the same shall have arisen at any subsequent period of his or her minority,"

and does not provide for the event of the death of such minor during the

Mode of authorising the application of accumulations of income.

—power to trustees to pay maintenance-fund to parent or guardian,

55 *b* [8]. And I further declare, that it shall be lawful for my said trustees or trustee, if they or he should think proper, to pay over any sum or sums of money, which, under or by means of the trusts of this my will, is or are made applicable to the maintenance, education, and support of any minor, to his or her parent or guardian (if any), [or to any person or persons who shall act as guardian or guardians of such minor, whether lawfully authorised or not,] to be so applied, and such trustees or trustee shall not be bound to see to the application thereof by such parent or guardian.

and to apply same without inquiry;

And I further declare, that it shall not be incumbent on my said trustees or trustee, previously to paying or applying any sum or sums of money for the maintenance and support of any minor, by virtue of the trusts aforesaid, to ascertain whether there is any other fund applicable to such purpose, or whether any person or persons is or are liable to provide such maintenance and support, any rule of equity to the contrary notwithstanding (*a*).

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minorities of other objects who would then become presumptively entitled to share in the accumulated fund.]

Points to be attended to in framing provisions for maintenance.

(*a*) In framing maintenance clauses, a clear expression of the intention on the following points is requisite:—

1st. Whether the whole income, or part only, is to be applied; if part only, then as to the destination of the excess; also to confer on the trustees (if it is intended that they shall have) full discretion in regard to the extent and manner of the application; if the excess is to be accumulated, the accumulated fund should be declared to remain applicable to maintenance. [See *Lewes* v. *Lewes*, 17 Law J., Ch. 425.]

2nd. Whether the trustees are themselves to apply the maintenance-fund, or are to pay it to the parent or guardian of the minor for this purpose, or (which is generally preferable) they are to have a discretion to do either the one or the other.

3rd. Whether the fund is to be applied in exoneration of or merely in aid of any other maintenance provision, and also, if the objects of the trust are not the testator's own children, whether it is to be applicable, without regard to the father's ability to provide maintenance.

4th. Where the testator has several funds devoted to the purposes of maintenance, the unapplied surplus of which are *variously* disposed of, the order and the proportions in which the income of the several funds is to be applied should be stated.

Whether income may be applied for maintenance, without regard to the father's ability.

With respect to exempting trustees from the necessity of inquiring into the father's ability to provide maintenance, the point is certainly now of less importance than formerly, when maintenance was not allowed, even under an express direction, until the father's inability to provide it was ascertained: *Andrews* v. *Partington*, 3 B. C. C. 60; *Puls-*

55 c[1]. Upon trust, from time to time to pay the annual produce and income arising therefrom unto my said wife, Interest to be paid to the wife during widow-

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ford v. *Hunter*, Id. 417. The case of *Hoste* v. *Pratt*, 3 Ves. 730, seems to have been the first which broke in upon this rule, Lord Loughborough there observing—"I think the parent is entitled to an allowance for maintenance here, *without any inquiry as to his ability*, for there is an express direction for maintenance;" though his Lordship afterwards assigned a reason, grounded on the particular circumstances of the case before him, namely, that, as the maintenance provision did not include all the children, by refusing maintenance he should diminish the ability of the father to provide for children who were not embraced by it. [See *Lucknow* v. *Brown*, 12 Jur. 1017, where Wigram, V. C., directed a reference as to the father's ability, notwithstanding an express direction to apply the income from the fund for maintenance.]

Since this period, maintenance has frequently been allowed in the case of infants, whose parents were in affluent and even opulent circumstances; the Court considering that, having regard to the amount of the children's fortunes, and the exigencies of the parent's family, his income was not so large as to exclude his claim to be relieved from the burthen of his children's maintenance by the appropriation of the fund in question.

Thus, in the case of *Jervois* v. *Silk*, G. Coop. 52, where the father, who sought for maintenance, had £6000 a year, the Court allowed £1400 a year for the maintenance of his six children, whose aggregate incomes amounted to £8600 a year. The principal ground for the claim, in this instance, was the expensiveness of the parent's establishments, which included one town house and two country houses; Sir Wm. Grant observing—"It is very loose to consider any particular income as enabling a father to maintain his children. To a nobleman, £6000 a year would not be thought enough to exclude him from requiring some maintenance out of his children's fortunes. To a private gentleman, it may be otherwise. On the outside it here would seem enough: at the same time, the expenses of his establishment, and his children's expectations, are circumstances to be looked to. It would be a harsh thing for the Court to oblige the petitioner to put down his establishment in any part to educate his children, when they have large incomes of their own." It does not appear whether, in this case, there was any express direction to apply the income for maintenance.

And even in the much earlier case of *Cavendish* v. *Mercer*, 5 Ves. 195, n., maintenance was allowed out of the annual proceeds of a large residue, without any express direction, in exoneration of a father, whose income was £1800 a year, but whose children were numerous, and not all included in the provision in the will: a circumstance which appears always to have had much weight in inducing a liberal allowance.

In the case of *Ex parte Penleaze*, 1 B. C. C., by Belt, 387, n., £400 a year was allowed for the future maintenance (in addition to an allowance for past maintenance) of an infant, whose then income was £760 a year, and who, in the event of his surviving his mother, would become entitled to an additional income of £800 per annum. The allowance

hood; then—(*no power of appointment*), [*name*], or permit or empower her to receive the same during her widowhood; And from and immediately after her decease

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was ordered to be paid to the infant's father, the amount of whose income does not appear, but his wife (the infant's mother) derived £2000 a year under the same will for her separate use, independently of the father.

If, however, it may be collected from the will, that the testator does not mean the income to be applied in exoneration of any other funds, but only in case there is an absence of other sources of provision, the construction of course will conform to this view of the intention.

Thus, where the will authorised the trustees to apply for maintenance so much of the infant's share or proportion *as might be necessary*, Sir R. P. Arden, M. R., held, that no part of the income could be applied until all other appropriations, come from what quarter they might, had been exhausted; and therefore, as it appeared that an ample fund for maintenance had been provided for the infants by the will of their father, no part of the income in question could be applied: *Rawlins* v. *Goldfrap*, 5 Ves. 440.

[Of course it is competent for the father to contract by his marriage settlement, that a particular fund, whether brought in on his side or on the lady's, shall be applied for maintenance, in which case he will be entitled to have it so applied whatever his own ability may be; and the directions respecting maintenance usually inserted in marriage settlements amount to such a contract: *Mundy* v. *Lord Howe*, 4 B. C. C. 223; *Meacher* v. *Young*, 2 Myl. & Kee. 490; *Stocken* v. *Stocken*, 4 Myl. & Cr. 94. But a mere *authority* to the trustees of a settlement to apply the income of the *presumptive* shares of infants for maintenance does not entitle the husband to have the funds so applied, if he is of ability to maintain them: *Thompson* v. *Griffin*, 4 Cr. & Ph. 317.

[And if the income is given to the *father* for the maintenance of his children, that is a bounty to him rather than to his children, and, of course, excludes inquiry as to his ability aliunde: *Brown* v. *Casamajor*, 4 Ves. 498. But if the fund is given to the father *in trust* for the maintenance of his children, though he is entitled to apply for that purpose whatever may be his ability, he must account for the application like any other trustee; *Wetherell* v. *Wilson*, 1 Kee. 80; *Bateman* v. *Foster*, 1 Coll. 118; which, in the case of a gift to him, merely to *enable* him to maintain his children, he would not be liable to do, so long as he maintained them properly: *Leach* v. *Leach*, 13 Sim. 304. See *Allen* v. *Coster*, 1 Beav. 202; *Crockett* v. *Crockett*, 12 Jur. 234.]

As to allowances to parents for past maintenance.

Formerly, an allowance for past maintenance was always refused to a parent; the fact of his having actually maintained the infants being considered as a conclusive proof of his ability to do so; *Andrews* v. *Partington*, 3 B. C. C. 60; but, at the present day, the Court will listen to any reasonable application for past as well as future maintenance: *Reeves* v. *Brymer*, 6 Ves. 425; *Sisson* v. *Shaw*, 9 Ves. 288; *Ex parte Penleaze*, 1 B. C. C., by Belt, 387, n. In the case of *Maberly* v. *Turton*, 14 Ves. 499, the trustees were authorised to apply the income for maintenance, with the approbation of the father and mother, or the survivor. The trustees died; the father was the executor, and, having himself for some

or marriage again, then as to and concerning the said trust-monies, funds, and securities, and the annual produce and income thenceforth to arise therefrom,

55 c^2. In trust for all and every my child and children who shall be living at the time of my decease, and who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, for the absolute use and benefit of such child and children respectively, if more than one, in equal shares; subject, nevertheless, as to the shares of such of my children as shall be daughters, to the trusts hereinafter declared concerning the same.

—trust for children's sons at twenty-one; daughters at twenty-one or marriage;

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time maintained the infants, now claimed an allowance for such past maintenance. Lord Eldon directed the Master to inquire whether it would have been proper in any trustee acting in the execution of the will, to apply any and what part of the interest and dividends towards the maintenance of the children, and in what proportions, the Master having regard to the situation, circumstances, and ability of the father, and the fortunes of his children. [An inquiry as to the propriety of making an allowance for past expenditure will not be directed, except upon special grounds being shewn: *Ex parte Bond*, 2 Myl. & Kee. 439.]

Upon the whole it appears, that, though courts of equity have not professedly renounced all inquiry into the parent's ability to maintain his children, in determining the applicability of any given fund, yet they are disposed to admit so many considerations, as, reconciling the allegation of inability with apparent affluence, that the denial of the claim is restricted to a few extreme cases. Still, however, as judicial opinions on the point have greatly fluctuated and may again fluctuate, and the adjudications do not place the parent's claim on such a broad ground as to exclude controversy, it seems to be advisable expressly to exonerate trustees from the necessity of inquiring into the father's ability to provide maintenance, or into the applicability of any other fund, previously to their application of income destined to this purpose.

It should be observed, that where the *mother* is the only surviving parent, it is unnecessary to preclude inquiry into the fact of ability, she being under no obligation to maintain her legitimate children: *Billingsly* v. *Critchet*, 1 B. C. C. 268; *Tubb* v. *Harrison*, 4 T. R. 118; *Cooper* v. *Martin*, 4 East, 76. In these cases certainly, the non-liability of the mother's second husband was the only point decided; but it seems difficult to rest the husband's exemption on any grounds which would not exonerate the mother herself. [See *Berkeley* v. *Swinburne*, 6 Sim. 613; *Hadow* v. *Hadow*, 9 Sim. 438.]

Mother not bound to maintain her legitimate children.

Where there are several maintenance clauses, it conduces to brevity to insert a general provision, embracing the several particulars to which attention has been recommended in the present note, rather than to repeat them in each instance.

—maintenance of testator's children after death of tenant for life;

55 c^3. PROVIDED ALWAYS, AND I DIRECT AND DECLARE, that in case, at the death or marriage again of my said wife, any of my children, being a son or sons, should not have attained the age of twenty-one years, or, being a daughter or daughters, should not have attained that age or been married, then it shall be lawful for the trustees or trustee for the time being of my will, in their or his discretion, from time to time after the decease or marriage again of my said wife, to apply all or any part of the annual produce and income of the presumptive or expectant (*a*) share of each such child, being a son, during his minority, or, being a daughter, during her minority and discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; And that so much of any of the annual produce and income arising from the presumptive or expectant share of each such child respectively, as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof shall be added to the principal of the share whence the same shall have arisen; With power, nevertheless, for my said trustees or trustee for the time being, if they or he should deem it expedient so to do, to apply such accumulated fund, or any part of the same, in and for the maintenance and education of the child or children who for the time being shall be presumptively entitled thereto during his, her, or their minority or discoverture, or respective minorities or discovertures, as the case may be.

—accumulation;

—power of advancement;

55 c^4. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said trustees or trustee for the time being, with the consent in writing of my said wife, during her widowhood, and after her decease or marriage again, then in the discretion of my said trustees or trustee, to apply any part, not exceeding one-half, of the principal of the vested or presumptive or expectant share or respective shares of each or any of my children of and in my residuary personal estate, in or towards the advancement or preferment in the world, or otherwise for the benefit, of the child or children to whom such share or respective shares shall actually or presumptively

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(*a*) [There is no power of appointment here. Where there is such a power, under which a child might take a *vested* interest during minority and discoverture, the provision for maintenance should extend to "presumptive, expectant, or *vested* shares."]

belong, in such manner as my said trustees or trustee shall think proper.

55 c^5. And I direct and declare, that my said trustees or trustee for the time being shall stand possessed of the share or respective shares in the said trust-monies, funds, and securities, of such of my children as shall be a daughter or daughters, upon the trusts following, (that is to say): Upon trust, to continue or lay out and invest the share of each such daughter respectively, in the names or name of my said trustees or trustee, upon such investments or securities as are herein authorised to be used for investments of trust-monies; And from time to time to pay the annual produce and income of the said trust-monies, funds, and securities, into the proper hands of such daughter of mine as aforesaid, for and during her life, so that the same may be for her sole and separate use and benefit, free from the control, debts, and engagements of any husband; And so that she may not have power to alienate, dispose of, engage, or receive the same or any part thereof by way of anticipation; And from and after the decease of such daughter of mine as aforesaid, then, as to as well the said trust-monies, funds, and securities, as the annual produce and income thenceforth to arise therefrom,

—trusts of daughter's shares of residue;

—for daughters' separate and inalienable use;

55 c^6. In trust, for all or any one or more of the children, grandchildren, or other issue of such daughter, (and, as to a grandchild or grandchildren or other issue, whether his, her, or their parent or parents be living or dead at the time of such appointment, but so that such grandchildren or other issue be born in the lifetime of my said daughter), for such interest or interests, and in such proportions, and subject to such conditions, restrictions, and limitations over, in favour of any other or others of the said children, grandchildren, or other issue, and with such regulations for maintenance, education, and advancement, and to be paid or transferred at such age or ages, either absolutely or upon such contingencies as such daughter of mine as aforesaid, whether covert or sole, shall at any time, or from time to time, by any deed or deeds, to be executed by her in the presence of, and to be attested by, one witness or more, and to be made either with or without power of revocation and new appointment, or by her last will and testament, or any testamentary writing, direct or appoint; And in default of such direction, limitation, or appointment, as to any part or parts of, or interest in, the said trust-funds constituting the share of such daughter of mine as afore-

—for children and issue as daughter shall appoint;

said, which shall not be effectually appointed, then as to the said unappointed fund or share, and the annual produce and income thereof—

—in default of appointment, for children equally;

55 c^7. In trust for all and every the child and children of such respective daughter of mine living after my decease, who, being a son or sons, shall attain the age of twenty-one years, [or die under that age leaving issue (*a*),] or, being a daughter or daughters, shall attain that age or marry, if more than one, in equal shares as tenants in common, for the absolute use and benefit of such child or children respectively; And if there should be no child of my daughter who shall live to acquire a vested interest in such daughter's share of the said trust-monies, funds, and securities, under the trust hereinbefore contained (*b*)—

—on failure of children, in trust as daughter shall appoint;

55 c^8. Upon such trust, for such person or persons, to and for such ends, intents, and purposes, and in such manner and form in all respects, as such daughter as aforesaid shall at any time or times, while sole, by any deed or deeds, to be executed and attested as aforesaid, and to be made either with or without power of revocation and new appointment, or, whether covert or sole, by her last will and testament or any testamentary writing, direct, limit, or appoint; And, in default of such direction, limitation, or appointment, and subject to any appointment which shall not be a complete disposition of the trust-premises, then—

—in default, for next of kin;

55 c^9. In trust for the person or persons who would, by virtue of the Statutes of Distribution, be entitled to the personal estate of my daughter at the time of her decease, if she had died intestate, and without leaving a husband or child,

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(*a*) [These words supersede the necessity of a clause substituting the issue of a son who dies under age, without entitling the son absolutely on his marriage.]

(*b*) This seems rather more correct than saying—"who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry,"—because the latter words do not take in the event of the children of a daughter attaining majority or marriage, and afterwards all dying in the testator's lifetime. The point, however, is only one of verbal accuracy; for there can be no doubt of the gift over taking effect in the event suggested, though the words of the will do not literally embrace it. [The words "living after my decease," now inserted in the limitation to the children, in order to exclude the operation of the 33rd section of the Wills Act, would, of course, be repeated in the clause here referred to, if it were expressed in that form, and would then render it accurate.]

and, if more than one, in the like shares (*a*), and upon, to, or for no other trust, intent, or purpose whatsoever. (*Add hotchpot clause, maintenance and advancement clauses*).

—hotchpot clause;

55 *c*[10]. PROVIDED ALWAYS, AND I HEREBY FURTHER DECLARE, that no child of any daughter of mine, who, or whose issue (*b*), shall take any share or shares of the said trust-monies, funds, and securities, by virtue of any appointment or appointments to be made by any such daughter under the power hereinbefore contained, shall, without an express declaration to that effect in such appointment or respective appointments to be contained, be entitled to any share of the unappointed part of the said trust-monies, funds, and securities, unless the share or shares appointed to him or her, or his or her issue, be brought into distribution with the other child or children, and an allowance be made for the same.

—power to daughters to bequeath life-interests to their husbands;

[55 *c*[11]. PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that, notwithstanding the trusts hereinbefore contained, it shall be lawful for any and every daughter of mine, who shall die leaving a husband surviving her, by her last will and testament or any testamentary writing, to bequeath the annual produce and income arising from her share of the said trust-monies, funds, and securities, or any part thereof, unto or for the benefit of such husband, for any period not exceeding the term of his life (*c*).]

—maintenance of children of daughters whose life-interests are limited successively to the widow and the daughters;

55 *c*[12]. PROVIDED ALSO, AND I FURTHER DECLARE, that in case, at the death of any daughter of mine, any of the children, grandchildren, or other issue of such daughter, who, under the trusts hereinbefore contained, or under any appointment or appointments to be made in his, her, or their favour by virtue of the power hereinbefore contained, may be entitled to any vested or presumptive share or respective shares of the said trust-monies, funds, and securities, being a male or males, shall not have attained the age of twenty-one years,

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As to limiting the shares of daughters dying without issue to the other children.

(*a*) Sometimes the shares of daughters are made to go over to the other children in the event of their dying without leaving issue; but this seems scarcely fair, as it extends the inequality between them and the sons beyond what is required for the exclusion of marital influence, which constitutes the sole reason for modifying the daughters' shares.

(*b*) [The common form does not provide for the case of an appointment to the issue of a living child.]

(*c*) [See the form where this power is given only in case of failure of children, (55 *e*[14]).]

or, being a female or females, shall not have attained that age or been married, then (subject and without prejudice to any direction to the contrary, restriction or regulation which may be made by any such appointment or appointments as aforesaid), it shall be lawful for the trustees or trustee for the time being of my will, in their or his discretion, from time to time, after the decease of such daughter as aforesaid, (my said wife being then deceased or having married), to apply all or any part of the annual produce and income of the vested or presumptive share of each such child, grandchild, or issue, being a male, during his minority, or, being a female, during her minority or discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit;

—accumulations; And that, subject as aforesaid, so much (if any) of the annual produce and income arising from the share or presumptive share of each such child, grandchild, or issue respectively, as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof be added to the principal of the share whence the same shall have arisen; With power, nevertheless, to my said trustees or trustee for the time being, if they or he should deem it expedient so to do, to apply the accumulated fund, or any part thereof, in and towards the maintenance and education of any minor or minors for the time being actually or presumptively entitled thereto.

—provision for advancement. 55 *c*[13]. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said trustees or trustee for the time being, during the life of such my daughter as aforesaid, with the consent in writing of such my daughter, (and also of my said wife, if living, and not then or previously married), and, after the death of such daughter, then in the discretion of my said trustees or trustee, to apply any part, not exceeding one-half, of the principal or value of the vested or presumptive share of each or any of the children, grandchildren, or issue of such daughter of mine as aforesaid, under or by virtue of the trusts hereinbefore contained, or under or by virtue of any appointment or appointments to be made as aforesaid, (subject, nevertheless, to any direction to the contrary, restriction or regulation in any such appointment or appointments to be contained), in and towards the advancement or preferment in the world, or otherwise for the benefit of the child, grandchild, or issue to whom such share or respective shares shall actually or presumptively belong.

55 d[1]. Upon trust to pay the annual produce and income of the said trust-monies, funds, and securities unto my said wife, or to permit or empower her to receive the same during her life, to be applied by my said wife for the support, maintenance, and education (*a*) of herself and my children for the time being, in such proportions and manner as she shall think proper; And from and after the decease of my said wife, Upon trust that my said trustees or trustee for the time being shall stand possessed of and interested in the said trust-monies, funds, and securities—

Interest to wife for life, to be applied for maintenance of herself and children;

—after the decease of wife, in trust for the children then living, and the issue of deceased children per stirpes. (*No power of appointment*);

55 d[2]. In trust for all and every the child and children of mine who shall survive me and be living at the decease of my said wife, and who shall attain the age of twenty-one years or marry (*b*), as tenants in common, if more than one; And also the issue then living, and who shall attain the age of twenty-one years or marry, of any child or children of mine who shall have died in the lifetime of my said wife, (whether in my lifetime or after my decease), such issue through all the degrees to take per stirpes and if more than one as tenants in common, such share or respective shares only as his or their parent or respective parents would have been entitled to if living, for the absolute use or benefit of such child, children, or issue respectively. And in case no child of mine, or the issue of any deceased child, should be living after my decease and at the decease of my said wife, or, being such, he, she, or they should die under the age of twenty-one years, and without having been married, then—

55 d[3]. Upon trust to transfer the said trust funds and premises to my brother, [*name*], for his own absolute use and benefit.

—if no child, &c., to testator's brother;

(*a*) [In *Collier* v. *Collier*, 3 Ves. 33, a bequest of an annuity to the testator's widow in addition to her jointure, "in consideration of the expense and care she will incur in the maintenance of our children," was held not to impose upon her the obligation of educating them, or even of maintaining them while at school. Upon an application for a further allowance for education, Lord Loughborough, C., said there was nothing to limit their maintenance—the Master in computing what was proper must have regard to the circumstance that the mother's house was the children's home. The testator could not mean that she should be laid under a temptation to spoil the boys by keeping them at home.]

Maintenance does not include education.

(*b*) [Here the shares of sons are limited to vest on marriage under twenty-one, so that there is no occasion to provide for the issue of sons dying under twenty-one.]

—maintenance of testator's children and more remote issue after wife's decease [or marriage];

55 *d*[4]. PROVIDED ALWAYS, AND I HEREBY DIRECT AND DECLARE, that, in case, at the death [or re-marriage] of my said wife, any of my children or other issue presumptively [or actually] entitled to any share of or interest in the said trust-monies, funds, and securities, under the trusts hereinbefore contained, being a male or males, should not have attained the age of twenty-one years, or, being a female or females, should not have attained that age or been married, then it shall be lawful for the said trustees or trustee for the time being of my will, in their or his discretion, from time to time after the decease [or re-marriage] of my said wife, to apply all or any part of the annual produce and inco meof the presumptive or expectant [or other] share of each such child or other issue, being a male, during his minority, or, being a female, during her minority and discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; And that so much (if any) of the annual produce and income arising from the presumptive or expectant [or other] share of each such child or other issue respectively, as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof shall be added to the principal of the share whence the same shall have arisen, and shall follow the destination thereof; With power nevertheless for the said trustees or trustee for the time being, if they or he shall deem it expedient so to do, to apply such accumulated fund, or any part of the same, in and for the maintenance and education of the person or persons for the time being presumptively or actually entitled thereto, during the period of his, her, or their minority or discoverture, or respective minorities or discovertures, as the case may be.

—power of advancement.

55 *d*[5]. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said trustees or trustee for the time being, with the consent in writing of my said wife, during her life [*or*, widowhood], and after her decease [or re-marriage], then in the discretion of my said trustees or trustee, to apply any part, not exceeding one-half, of the principal of the vested or presumptive or expectant share or respective shares of each or any of my said children or other issue of and in my residuary personal estate, in or towards the advancement or preferment in the world, or otherwise for the benefit, of the child or children, or issue to whom such share or respective shares shall actually or presumptively belong, in such manner as my said trustees or trustee shall think proper.

55 *e* [1]. Upon trust, as to one moiety or equal half part of the said trust-monies, funds, and securities, from time to time to pay the annual produce and income arising therefrom unto my said wife, or permit or empower her to receive the same during her widowhood (*a*). Income of one moiety to wife during widowhood;

55 *e* [2]. And as to, for, and concerning as well the said moiety or equal half part of the said trust-monies, funds, and securities (subject as aforesaid), as also the other moiety or equal half part thereof immediately after my decease, In trust to be paid or transferred to or divided between or among all and every my child and children who shall survive me, and, being a son or sons, shall attain the age of twenty-five years, or, being a daughter or daughters, shall attain the age of twenty-one years, or marry with the consent of her or their guardians for the time being (if any), for the absolute benefit of such children respectively, in such shares and proportions that the share of each son of mine shall be double or twice the amount of the share of each daughter of mine, or in the proportion of two to one (*b*), And all the said shares respectively shall be interests vested in such children respectively at the several ages or periods aforesaid, and not before. —trust for children, sons at twenty-five, daughters at twenty-one or marriage, sons' shares being double those of daughters;

55 *e* [3]. Provided nevertheless, and it is my will, that in case any of my children should depart this life before me, or before he, she, or they shall have acquired a vested interest or vested interests in the said trust-premises under the trusts aforesaid, then and in such case, I direct and declare, that such child or children of each child of mine so dying, as shall live to attain the age of twenty-one years, or marry under that age, shall take and be entitled to the share in the said trust-monies, funds, and securities, which his, her, or their parent would have taken under the trusts aforesaid, if he or they, being a son or sons, had attained the age of twenty-five years, or, being —clause substituting the issue of children dying before the vesting age;

(*a*) This form, and two others which have preceded it, (55 *c*) and (55 *d*), exhibit much variety in the mode of providing for the testator's widow. In (55 *c*), the widow takes the entire income for her own use during her widowhood; in (55 *d*), she takes the income for life, charged with the maintenance of the testator's children; and in the present instance, the widow takes an immediate life interest in a moiety during widowhood, the other moiety being given to the children, on failure of whom before the vesting age the widow also takes an interest for life (not during widowhood merely) in this moiety. As to provisions for widow.

(*b*) [Vide ante, p. 542, n.]

a daughter or daughters, had attained the age of twenty-one years or been married with such consent as aforesaid, and if more than one, shall take such share between or among them in equal shares and proportions; But, in case no child of mine, being a son, should survive me, or live to attain the age of twenty-five years, or leave a child or children surviving me and attaining the age of twenty-one years, or marrying under that age, or no such child, being a daughter, shall live to attain the age of twenty-one years or to marry with such consent as aforesaid, or leave a child or children surviving me and attaining the age of twenty-one years or marrying under that age, then I DECLARE, that my said trustees or trustee for the time being shall stand possessed of the moiety or equal half part of the said trust-monies, funds, and securities aforesaid, not hereinbefore bequeathed in trust for my said wife during her widowhood, or so much thereof as shall not have been applied and disposed of under the power of advancement hereinbefore contained—

—on failure of children,

remaining moiety to wife for life;

—and, subject thereto,

55 e^4. UPON TRUST, to pay the annual produce and income arising from such last-mentioned moiety unto my said wife, or permit her to receive the same during her life; And after her decease, then as to the entirety of all and singular the said trust-monies, funds, and securities, in the events aforesaid, UPON SUCH AND THE LIKE TRUSTS, and to and for such and the like intents and purposes, and with, under, and subject to such and the like powers, provisoes, and declarations, for the benefit of my niece, [*name*], and her children, or her surviving husband (being an appointee), as are hereinafter expressed and declared concerning the share of each of my daughters in the said trust-monies, funds, and securities, as fully and effectually in all respects as if the same were here repeated; And in case my said niece should die without leaving any child who shall acquire a vested interest under the trust lastly hereinbefore contained, then as to all and singular the said trust-monies, funds, and securities, after the decease of my said niece, and after the determination of the interest of any surviving husband of her my said niece (being an appointee)—

upon trusts for testator's niece and her children, by reference to trusts for testator's daughters;

—ultimate bequest to trustees;

55 e^5. IN TRUST for my friends, [*trustees*], in equal shares, for their own proper use and benefit.

—trust for maintenance before the

55 e^6. PROVIDED ALWAYS, AND I HEREBY DECLARE, that in case, at my decease, any of my sons should be under the age

of twenty-five [*or*, twenty-one] years, or any of my daughters should be under the age of twenty-one years and unmarried, then I DIRECT, that my said trustees or trustee shall (subject, nevertheless, and without prejudice to the trust hereinbefore declared concerning the income of one moiety of the said trust-monies, funds, and securities for my wife during widowhood as aforesaid,) apply, in or towards the maintenance and education, or otherwise for the benefit, of each such child until he or she shall acquire a vested interest in the said trust-monies, funds, and securities under the trusts aforesaid, the annual produce and income arising from the expectant or presumptive share of such child under the trusts aforesaid, or such part thereof as my said trustees or trustee shall think proper; And that the unapplied residue, if any, of such annual produce and income shall be added to the capital of the share or respective shares whence the same shall have arisen, subject, nevertheless, to be afterwards applied in or towards the maintenance of the child or children respectively for the time being presumptively entitled thereto, if my said trustees or trustee should think proper so to apply the same. AND I FURTHER DECLARE, that the provision for maintenance lastly hereinbefore contained, shall equally extend and be applicable to the expectant or presumptive or respective shares of the issue of any child or children of mine who shall die leaving issue in the manner hereinbefore mentioned, until such issue shall attain the age of twenty-one years, when he, she, or they will acquire a vested interest or vested interests respectively, in his, her, or their parent's or respective parent's shares, under the provision in that behalf hereinbefore contained.

vesting age. (*No prior life interest*);

—provision for maintenance to extend to issue;

55 *e*[7]. PROVIDED ALSO, AND I FURTHER DIRECT AND DECLARE, that it shall be lawful for my said trustees or trustee for the time being, with the consent in writing of my said wife during her widowhood, and, after her decease or marriage, at their or his own discretion, to apply any part of the principal of the presumptive or contingent share, or respective presumptive or contingent shares, of any one or more of my said children or of the issue of such children, in the said trust-monies, funds, and securities, (including both the moieties into which the same are for certain purposes hereinbefore divided), before the period of the vesting of such shares respectively under the trusts aforesaid, in or towards establish-

—power of advancement with consent of widow;

ing my son or sons respectively in some profession or business, or otherwise for his, her, or their advancement or preferment in life, as my said trustees or trustee shall think proper. But I earnestly injoin and request my said trustees or trustee, in exercising this present power, not to endanger the future interests of my children by placing their property in their hands prematurely, and before they have acquired sufficient experience to capacitate them for the prudent and judicious management thereof; Nevertheless, this injunction is not to be construed to fetter in the least degree the discretionary power of my said trustees or trustee under the clause aforesaid.

—injunction to trustees;

55 e^{8}. And I HEREBY DIRECT AND DECLARE, that the share in the said trust-monies, funds, and securities, of each of my children who shall be daughters, and shall attain the said age of twenty-one years or marry [with such consent as aforesaid, or shall marry with my consent in my lifetime, (which shall for all the purposes of my will be considered as a marriage with consent),] shall not be paid or transferred absolutely to such respective daughter, but shall be held by my said trustees or trustee for the time being, (subject, nevertheless, to the trust concerning the income arising from one moiety of the trust-premises in favour of my said wife during her widowhood as aforesaid), upon the trusts hereinafter expressed, (that is to say), whether such daughter shall marry before attaining her age of twenty-one years, or shall attain such age without having married, Upon trust to continue or lay out the same respective share in the names or name of the said trustees or trustee, in or upon such investments as are hereinbefore authorised to be used, with power from time to time to vary the same as often as shall be deemed expedient; And to stand possessed of the said trust-monies, funds, and securities, upon the trusts following; (that is to say,)

—trusts concerning daughters' shares;

55 e^{9}. Upon trust to receive the annual produce and income of the said trust-monies, funds, and securities, and from time to time to pay the same into the proper hands of such daughter for and during her life, so that the same may be for her sole and separate use and benefit, free from the control, debts, and engagements of any husband; And so that such daughter of mine may not have power to alienate, dispose of, engage, or receive the same, or any part thereof, by

—for daughter for life for her separate and inalienable use; and subject thereto,

way of anticipation; And from and immediately after the decease of such daughter of mine as aforesaid, then as to as well the said trust-monies, funds, and securities forming the share of such daughter as aforesaid, as the annual produce and income thenceforth arising therefrom—

—in trust for the children equally;

—clause of accruer;

55 e[10]. In trust (*a*) for all the children of such daughter of mine, if there should be more than one, to take in equal shares as tenants in common for their own respective use and benefit; And in case any one or more of the said children, being a son or sons, should die under the age of twenty-one years, or, being a daughter or daughters, should die under that age without having been married, then as to as well the original share or shares of the said trust-monies, funds, and securities belonging to the child or children respectively who shall so die as aforesaid, as also the share or shares thereof to which the same child or children respectively may become entitled under this present trust, In trust for the other or others of the said children, and if more than one to take in equal shares as aforesaid, for his, her, or their own absolute use and benefit; or in case there should be originally only one child of such my daughter as aforesaid (*b*), Then in trust for such only child, for his or her absolute use and benefit.

—in default of children of daughter, then upon the trusts declared of the remaining shares;

55 e[11]. But in case there should be no child of such daughter of mine, or no such child who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, Then, as to the part of the said trust-monies, funds, and securities constituting the share of such daughter as aforesaid, I hereby direct and declare that my trustees or trustee for the time being shall stand possessed thereof, upon the trusts and for the purposes by this my will

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(*a*) Here, it will be observed, the daughters have no power of selection, (as in the form (*55 c*[6])). Such a power has a salutary tendency in increasing parental influence, and enabling the donee to adapt her disposition of the property to the circumstances existing at the time of its exercise.

As to limitations of personalty, with clauses of accruer.

(*b*) This form exemplifies what does not occur in any previous one, namely, a clause of accruer; for, instead of giving the children as they come into existence immediately vested interests, with a liability to be divested on their dying before the age of distribution, it has been generally preferred, as promoting simplicity and brevity, to suspend the vesting until the latter period.

declared concerning the other or remaining shares of the said trust-monies, funds, and securities, for the benefit of my other children respectively, or their issue, so far as the same trusts and purposes shall then happen to be subsisting and capable of taking effect. And the respective shares so accruing to the other or remaining objects of the trusts hereinbefore contained, which shall be then subsisting as aforesaid, shall be subject to all the trusts and declarations in this my will contained (including this present provision) concerning the original shares of such objects respectively, as fully and effectually as if the same were here repeated. And in case none of the trusts declared by this my will concerning the other or remaining shares in favour of my other children or their issue should be then subsisting, or in case such trusts should afterwards fail, then the share of such my daughter respectively who shall die without leaving any child who shall acquire an absolutely vested interest as aforesaid, shall be subject to the trusts of this my will, which are subsequent and ulterior to the trust hereinbefore declared in favour of my child and children, and the issue of any deceased child or children as aforesaid.

—provision for maintenance as to daughters' shares;

55 e^{12}. PROVIDED ALWAYS, AND I HEREBY DECLARE, that, in case at the death of any such my daughter as aforesaid, any of the children of such daughter who shall be presumptively [or actually] entitled to any share or shares in the part or share of the said trust-monies, funds, and securities constituting the share of such daughter as aforesaid, shall, being a son or sons, not have attained the age of twenty-one years, or, being a daughter or daughters, not have attained that age or been married, then it shall be lawful for the said trustees or trustee for the time being of my will, in their or his discretion, from time to time after the decease of such respective daughter as aforesaid, (without prejudice, nevertheless, to the trust hereinbefore declared concerning one moiety of the said trust-premises for the benefit of my said wife during her widowhood as aforesaid), to apply all or any part of the annual produce or income of the actual or presumptive share of each such child, being a son, during his minority, or, being a daughter, during her minority and discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; And that so much, if any, of the annual produce or income arising from the share of each such child respectively

as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof be added to the principal of the share whence the same shall have arisen, and be subject to all the trusts and directions herein contained concerning the same; but the same may afterwards be applied, in the discretion of my said trustees or trustee, for the benefit of the person or persons for the time being presumptively [or actually] entitled thereto, during his, her, or their minority or discoverture, as the case may be.

—power of advancement;

55 e^{13}. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said trustees or trustee for the time being, during the life of any such daughter of mine as aforesaid, with her consent in writing, and after her decease then in the discretion of my said trustees or trustee, (but without prejudice to the aforesaid trust for the benefit of my said wife), to apply any part not exceeding one-half of the principal or value of the presumptive or vested share of each or any of the children or issue of each daughter of mine as aforesaid under the trusts hereinbefore contained, [or under any appointment to be made as aforesaid,] in or towards the advancement or preferment in the world, or otherwise for the benefit, of the child to whom such share shall actually or presumptively belong.

—power to daughters to bequeath life interests to surviving husbands.

55 e^{14}. PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that, notwithstanding the trusts hereinbefore contained concerning the shares of my said daughters respectively, it shall be lawful for any such daughter of mine as aforesaid, in case she should have no child who shall acquire an absolutely vested interest in the share of such daughter in the said trust-monies, funds, and securities under the trusts hereinbefore contained, by her last will and testament, or any testamentary instrument, to appoint UNTO OR IN TRUST for the husband of such daughter respectively, who may happen to survive her, for his own use and benefit, the annual produce and income arising from the share of such daughter respectively in the said trust-monies, funds, and securities, for any term or period not exceeding the life of such husband respectively (*a*).

(*a*) There would, in general, be but little hesitation to give daughters a power of this nature on failure of children; in which respect the present power differs from the one in the form (55 c^{11}), where it is made to take precedence of the trust in favour of the children.

For children by name, and the issue of deceased children at twenty-one;

55 *f* [1]. Upon trust, to divide the said trust-monies and premises, or the residue or surplus of my said residuary personal estate, unto and equally among my sons and daughters, [*names*], or such of them as shall be living at the time of my decease, and the child or children then living, and who shall attain the age of twenty-one years, of any of my said children who may have died in my lifetime; such issue to take only the share or respective shares which his, her, or their parent or respective parents, if living, would have been entitled to.

—power to invest share of issue during minority;

55 *f* [2]. And in case any of such issue should be under the age of twenty-one years at the time of my decease, then I direct my said trustees or trustee for the time being to invest the expectant or presumptive share or respective shares of such issue in the public stocks or funds or on real securities in England or Wales, in their or his own names or name; With power from time to time to vary the same investments as they or he shall think fit.

—power to trustees to apply income for maintenance during minority, (*applicable to interests in residuary realty*);

55 *f* [3]. And I empower and direct my said trustees or trustee for the time being to apply the [rents and] annual produce and income arising from the respective shares or properties, or expectant shares or properties, to which any grandchildren of mine shall be actually or presumptively entitled in possession, or to which they would, if of full age, be entitled in possession under the trusts aforesaid, to and for the maintenance and education of such grandchildren respectively, or, in the discretion of my said trustees or trustee, to pay the said [rents and] annual produce and income, or such part thereof as they or he shall deem adequate for the purpose, to the surviving parent or other guardian of such grandchildren, to be so applied during their respective minorities. And I declare, that the unapplied part of the said rents and annual produce (if any) shall be invested and follow the destination of the shares or properties from whence the same respectively shall have arisen, but may be applied at any time for the maintenance, education, or benefit of any minor presumptively entitled thereto.

—not to be answerable for maintenance-money paid to guardians.

And I direct, that my said trustees or trustee shall not be responsible for the due application of any monies which they shall so as aforesaid pay to the surviving parent or guardian of any grandchild of mine, nor shall be bound to inquire into the ability of the father (if any) of such respective grandchild to provide for his or her maintenance and education.

Trust for tes-

55 *g* [1]. In trust for all and every my child and children

who, being a son or sons, shall attain the age of twenty-five years or marry under that age, or, being a daughter or daughters, shall attain the age of twenty-one years or marry under that age, including my said daughter, [*illegitimate daughter*](*a*), if she should attain the said age or marry, to be divided between or among such children as shall become entitled to the same, if more than one in equal shares and proportions; And if there should be but one such child, then the whole of the said trust-monies, funds, and securities to be in trust for such only child.

testator's children; sons at twenty-five or marriage, and daughters at twenty-one or marriage (including an illegitimate daughter);

—if only one child, the whole for such child;

55 g^2. PROVIDED ALWAYS, NEVERTHELESS, AND I HEREBY DIRECT AND DECLARE, that in case at my death any son or sons of mine should be under the age of twenty-five years and unmarried, or my said daughter, [*illegitimate daughter*], or any other daughter of mine, should be under the age of twenty-one years and unmarried, then, and in every such case, my said trustees or trustee for the time being shall, from and after my decease, during such time as each such last-mentioned son or daughter shall respectively be under such age, and unmarried as aforesaid, receive and take the annual produce and income of the presumptive or expectant portion or share of each and every such last-mentioned son and daughter respectively of or in the said trust-monies, funds, and securities, and pay and apply the same, or an adequate part thereof, in or towards the maintenance and education of such last-mentioned child, in aid of the provision by me already made for such maintenance and education (*b*); And shall accumulate and improve at compound interest the residue (if any) of such annual produce and income, by laying out and investing the same and the produce thereof, from time to time, in the names or name of my trustees or trustee for the time being, in the public stocks or funds of Great Britain, or upon real securities in England or Wales, [and not in Ireland,] to be from time to time altered and varied as they or he shall think fit. AND I FURTHER DIRECT AND DECLARE, that all such accumulations and increase, or so much thereof as shall not be eventually applied as last aforesaid, shall belong to the person or persons who, under the trusts of this my will, shall become absolutely and inde-

—provision for maintenance and education, where vesting of sons' shares is postponed to twenty-five (*no life-interest*),

and to accumulate the residue, if any;

—accumulations to belong to persons eventually entitled to principal funds;

(*a*) [Vide ante, p. 514.]

(*b*) [See the clauses, ante, p. 514.]

feasibly entitled to the principal share or shares, fund or funds, from the annual produce and income whereof such accumulations shall have been produced. Nevertheless, I DIRECT AND DECLARE, that such accumulated fund, or any part thereof, shall or may be afterwards applicable for the maintenance and education of the child or children respectively for the time being presumptively entitled thereto.

—when the daughters attain twenty-one or marry, one moiety only of their portions to be paid them,

55 g^3. PROVIDED ALSO, AND I FURTHER DIRECT AND DECLARE, that, when and as my said daughter, [*illegitimate daughter*], and any other daughter or daughters of mine shall attain the age of twenty-one years or shall marry, then and thereupon one moiety or equal half part only of the portion or share of each and every such daughter, of and in the said trust-monies, funds, and securities, and of the accumulations therefrom (if any), shall absolutely belong and be paid to her or them, and the remaining moiety or equal half part of the last-mentioned portion or share of each and every of them my said daughter, [*illegitimate daughter*], and any future daughter or daughters, and the accumulations therefrom (if any), shall go and be held and applied upon and for the trusts, intents, and purposes following, (that is to say)—

and the remaining moiety to be held upon the following trusts:

—trustees to pay the interest of such last moiety, for their separate and inalienable use;

55 g^4. UPON TRUST, that my said trustees or trustee for the time being shall, during the life of each and every of them my said daughter, [*illegitimate daughter*], and any such other daughter or daughters, pay and apply the annual produce and income of the last-mentioned moiety or half part of her portion or share of the said trust-monies, funds, and securities, and of the unapplied accumulations therefrom, unto such person or persons and for such purposes, as such daughter shall from time to time, when and as the same or any part thereof shall become due, but not by way of assignment, charge, or other anticipation thereof, direct, free from the debts and control of the husband for the time being of each such daughter; For which purpose it is my will, that the receipts in writing of such daughter or such her appointee respectively as aforesaid, shall from time to time, notwithstanding the coverture of such daughter, be effectual discharges for such annual produce and income, hereby made payable to her or them respectively as aforesaid, as shall be then payable and be thereby acknowledged to be received; but so that such daughter shall not have power to alienate, dispose of, engage, or receive the same or any part thereof by way of anticipa-

tion (*a*). And from and after the decease of my said daughter, [*illegitimate daughter*], and of each such daughter of mine hereinafter to be born, my will is, that such last-mentioned moiety of each and every such daughter's portion or share, the benefit of which moiety is hereby given to her for her life as aforesaid, of or in the said trust-monies, funds, securities, accumulations, and premises, shall go and be—

—after decease of daughters, such moiety to be for their children; (sons at twenty-one, and daughters at twenty-one or marriage);

55 g^5. In trust for all and every the child or children of every such daughter, who, being a son or sons, shall attain the age of twenty-one years (*b*), or, being a daughter or daughters, shall attain that age or marry, to be equally divided between or among such children if more than one. And if there should be but one such child, then the whole of such last-mentioned moiety of the said portion or share shall go to and be in trust for such only child of such daughter (*c*); And if my said daughter, [*illegitimate daughter*], or each or any of my daughters hereafter to be born, should die without having a child who shall survive me, and who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then the last-mentioned moiety of the portion or share and interest of each such daughter so dying of or in the said trust-monies, funds, securities, accumulations, and premises, shall go to and be—

—if no child, as daughters shall by will appoint;

(*a*) [See a neater and more concise form of trust for separate and inalienable use (55 e^9).]

(*b*) The doctrine against perpetuities, discussed ante, p. 157, does not admit of the vesting of the shares of the daughters' unborn sons being absolutely postponed to the age of twenty-five, at which age the testator has made the shares of his own sons, not previously marrying, to vest. The object, however, may be effected conditionally, by the insertion of such a clause as (55 g^9), by which the vesting of such shares is postponed until the expiration of twenty-one years from the death of the survivor of the testator's issue living at his decease, or the attainment, by the respective grandsons, of the prescribed age. This vesting of the shares in the alternative event conforms to the rule of law, while it exposes the testator's design—the postponement of the vesting until the age of twenty-five—to very little actual danger of being frustrated, as in all probability the whole line of daughers' sons will have attained twenty-five before the expiration of twenty-one years posterior to the extinction of the survivor of the testator's descendants of every degree living at his decease.

Conditional postponement of vesting of shares of daughters' sons until the age of twenty-five.

(*c*) It will be observed, that the daughters have not a power of selection in favour of the issue, as in the form (55 *i*).

55 g^6. In trust for such person or persons, for such intents and purposes, and with and subject to such powers, directions, and provisoes as such last-mentioned daughter, by her last will and testament or any testamentary writing, shall from time to time, whether sole or married, direct or appoint (*a*); and in default of such direction or appointment, or so far as the same, if incomplete, shall not extend—

—in default of appointment, for their next of kin;

55 g^7. In trust for such person or persons as would have been entitled, by virtue of the Statutes of Distribution, to such last-mentioned moiety of her said portion or share of the said trust-monies, funds, and securities, if such daughter of mine had been absolutely entitled thereto and had died intestate, and without leaving a husband or child (*b*); it being my intention that the husband (if any) of such daughter, and any child or children whom such daughter may leave surviving her, and who may afterwards die without acquiring a vested interest under the aforesaid trust in favour of children, shall be excluded from taking any interest under the trust lastly hereinbefore contained.

Remarks as to the modifications of daughters' shares.

(*a*) Where a testator divides his personal property amongst his children in equal proportions, but subjects the shares of daughters wholly or in part to trusts for their separate use for life, and afterwards for their children, he intends not to create an inequality between his male and female children, but merely to apply to the daughters' interests modifications adapted to actual or possible coverture. Hence, it should seem, that the ownership or disposing power of the daughters ought not to be interfered with or curtailed further than this purpose requires. In default of children, therefore, each daughter should take an absolute interest in her share, or, at least, should have a general power of disposition over it. The precedent in the text confers a general *testamentary* power; a species of power which has this peculiarity, that, while it gives the donee the amplest control over the future destination of the property, it excludes the possibility of its being exercised for her own personal advantage. Such a power falls far short, therefore, of placing the daughters on a parity of footing with sons, who are made absolute owners of their shares, though it is well adapted to effect the purpose, generally a very favourite one, of causing the property to be retained in the family; for, unless the daughter should leave a surviving husband, it is rather to be expected that she will exercise her testamentary power in favour of her brothers and sisters, or their children.

Limitations to next of kin.

(*b*) [Under a limitation to the persons who would take the daughter's personal estate, if she died without leaving a husband, the husband might eventually become entitled, viz. as next of kin of a child of the daughter dying under age and unmarried. As to limitations to next of kin, &c., see p. 349.]

55 g^8. PROVIDED ALWAYS, AND I HEREBY DECLARE, that if any of my daughters (including the said [*illegitimate daughter*]) should die leaving issue, who, being a son or sons, shall be under the age of twenty-one years, or, being a daughter or daughters, shall be under that age and unmarried, then, and in such case, the annual produce and income of the presumptive share or shares of such issue in the said trust-monies, funds, and securities, or an adequate part thereof, shall, during his or their minority or minorities, or her or their minority and discoverture or minorities and discovertures, respectively, be applied for his, her, or their maintenance and education; and the residue thereof, if any, shall be accumulated, in the manner and for the purposes hereinbefore expressed concerning the annual produce and income of the presumptive portion or portions of or in the said trust-monies, funds, and securities, of any of my children, who, being a son or sons, shall be under the age of twenty-five years and unmarried, or, being a daughter or daughters, shall be under the age of twenty-one years and unmarried at the time of my death, until they shall respectively become absolutely entitled thereto; And which last-mentioned accumulations shall follow in like manner the principal fund, but with the same liability to be applied for subsequent maintenance and education as aforesaid.

—maintenance of daughters' issue;

—accumulation of surplus income by reference to preceding trusts for maintenance;

55 g^9. PROVIDED ALWAYS, AND I HEREBY DECLARE, that if any son or sons of any daughter or daughters of mine should attain the age of twenty-one years before the expiration of twenty-one years computed from the time of the decease of the survivor of my children and more remote issue (if any) living at the time of my decease, then, and in such case, the vesting of the share of each such grandson in the said trust-monies and premises shall be postponed to the end or expiration of such term of twenty-one years, or until the attainment by such respective grandson to the age of twenty-five years (which shall first happen), anything hereinbefore contained to the contrary notwithstanding.

—vesting of grandsons' shares postponed to the age of twenty-five, if not too remote.

55 h^1. UPON TRUST to pay the annual produce and income arising from the said trust-monies, funds, and securities, as the same shall from time to time arise and become due, to my said wife, or permit or empower her to receive the same for and during the term of her natural life; And from and

Trust for testator's wife for life; after her death,

after her decease, then, as to the said trust-monies, funds, and securities, and the annual produce and income thereof—

for testator's children and issue as wife shall appoint;

55 *h*[2]. In trust for such one or more of my children or more remote issue (such more remote issue to be born in the lifetime of my said wife), in such parts, shares, and proportions (if an appointment be made in favour of more than one object), subject to such provisoes and restrictions, and in such manner in all respects, as she my said wife, by any deed or deeds, or by her last will and testament, or any testamentary writing, shall direct, limit, or appoint; And in default of and subject to any such direction, limitation, or appointment—

—in default of appointment,

for children and issue living at wife's decease, per stirpes;

55 *h*[3]. Upon trust to pay, transfer, and divide the said trust-monies, funds, and securities, unto and equally between or among each and every child of mine who shall be living at the time of the decease of my said wife, and also the issue, if any, then living, of any child or children who shall have previously died either in my lifetime or after my decease, such children and issue respectively to take in equal shares; But so, nevertheless, that the issue of any child or children of mine shall take the share or respective shares only which his, her, or their parent or ancestor, or respective parents or ancestors would have been entitled to if living; And I declare, that the gift or trust lastly hereinbefore contained shall extend to issue of every degree, and that such issue shall be entitled per stirpes.

—clause explanatory of the term "issue."

—hotchpot—(testator's issue).

55 *h*[4]. Provided always, that no child [or other issue] of mine who or whose issue shall take any share or shares of the said trust-monies, funds, and securities by virtue of any appointment or appointments under the power hereinbefore contained, shall, without an express declaration to that effect in such appointment or respective appointments, take any share of the unappointed part of the said trust-monies, funds, and securities, unless the share or shares appointed to him or her or his or her issue be brought into distribution with such unappointed part of the said trust-monies, funds, and securities.

Trust for certain of the existing children by name and all after-born children. (*No life-interest*);

55 *i*[1]. In trust for such of my five children hereinafter named, (that is to say) [*names*], and any child or children of mine hereafter to be born, as shall be living at the time of my decease, and being a son or sons shall attain the age of twenty-one years, or, being a daughter or daughters, shall

attain that age or marry, for the absolute use and benefit of such children respectively, in equal shares; Subject, nevertheless, as to one moiety or equal half part of the share of each of my daughters, to the trusts hereinafter declared concerning the same.

—power to invest and to apply income for maintenance of children during minority; (*Where there is no prior direction to invest*).

55 *i*[2]. PROVIDED ALWAYS, AND I DIRECT AND DECLARE, that in case at the time of my decease any of my children being a son or sons should not have attained the age of twenty-one years, or being a daughter or daughters should not have attained that age or been married, then it shall be lawful for the trustees or trustee for the time being of my will to lay out and invest in their or his names or name the presumptive or expectant share of each such child in the said trust-monies arising and to be produced as aforesaid, in the public stocks or funds of Great Britain, or on mortgage of freehold, copyhold, or leasehold estates, or other real securities in England or Wales, and not in Ireland, with liberty from time to time to vary the same investments as my said trustees or trustee shall think proper; And from time to time in their or his discretion to apply all or any part of the annual produce and income of the said presumptive or expectant share of each such child in the said trust-monies, funds, and securities, being a son, during his minority, or being a daughter during her minority and discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; And that so much, if any, of the annual produce and income arising from the presumptive or expectant share of each such child respectively as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof shall be added to the principal of the share whence the same shall have arisen; But shall, nevertheless, at any time or times, be applicable, at the discretion of my said trustees or trustee, for the maintenance, education, or benefit of any child or children of mine for the time being presumptively entitled thereto.

—accumulation of surplus;

—advancement of testator's children;

55 *i*[3]. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said trustees or trustee for the time being, in their or his discretion, to apply any part not exceeding one-half of the principal of the expectant or presumptive share of each such child of mine as last aforesaid, in the said trust-monies, funds, and securities, in apprenticing him or her to any profession, trade, or business, or otherwise in or towards his or her advancement or preferment in the world, or for his

or her benefit or advantage, in such manner as my said trustees or trustee shall think proper.

—trusts of a moiety of daughters' shares;

55 i^4. PROVIDED ALWAYS AND I HEREBY DIRECT AND DECLARE, that my said trustees or trustee for the time being shall stand and be possessed of one moiety or equal half part of the part or share of each and every such child of mine, being a daughter, of and in the said trust-monies, funds, and securities, upon the trusts following (that is to say),

—to invest;

UPON TRUST, to lay out and invest the said trust-monies in the names or name of my said trustees or trustee, in or upon the public stocks or funds of Great Britain, or on mortgage of freehold, copyhold, or leasehold estates or other real securities in England; With liberty from time to time to vary any such stocks, funds, or securities for the time being vested in them, him, or her, as often as my said trustees or trustee shall think proper.

—for separate and inalienable use of each daughter for life;

55 i^5. AND UPON FURTHER TRUST, from time to time, to receive the annual produce and income arising from the stocks, funds, and securities for the time being composing the said moiety or equal half part of the share of each such daughter of mine as aforesaid, and pay the same into the proper hands of such daughter during her life, so that the same may be for her sole and separate use, free from the control, debts, and engagements of her husband for the time being, and so that such my daughter may not have power to alienate, dispose of, engage, or receive the same or any part thereof by way of anticipation, Subject, nevertheless, to the proviso for cesser hereinafter contained; And from and after the decease of such daughter of mine as aforesaid, then as to as well the said trust-monies, funds, and securities constituting such moiety or equal half part as aforesaid of the respective share of each such daughter in the said trust-premises, as the annual produce and income thenceforth to arise therefrom—

—after her decease,

for the children or more remote issue of daughter as she shall appoint;

55 i^6. IN TRUST for all or any one or more of the children, grandchildren, or other issue of such daughter, (such grandchildren or other issue to be born in her lifetime), for such interest or interests and in such proportions, if more than one, and subject to such conditions, restrictions, and limitations over in favour of any other or others of the said children, grandchildren, or other issue, and with such provisions for maintenance, education, and advancement, and to be paid or transferred at such age or ages, either absolutely or upon such contingencies and in such manner in all respects as such daugh-

ter of mine, whether covert or sole, shall at any time or from time to time by any deed or deeds revocable or irrevocable, to be duly executed, or by her last will and testament or any testamentary writing, direct or appoint; But so, nevertheless, that no object of this present power, of either sex, shall take or acquire any transmissible interest by virtue of any appointment by deed, to be executed in pursuance thereof, until such appointee shall have attained the age of twenty-one years, or shall have married; And, in default of such direction or appointment, and subject to any partial direction or appointment, then as to the said trust-monies, funds, and securities, and the annual produce and income to arise therefrom after the decease of such daughter of mine—

—appointed shares not to vest in unmarried minors;

—in default of appointment,

55 *i*[7]. In trust for such child or children of such daughter of mine, as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, if more than one in equal shares as tenants in common, for the absolute use and benefit of such child or children respectively; And, if there should be no child of such daughter of mine who shall live to acquire a vested interest in such daughter's share of the said trust-monies, funds, and securities, under the trust lastly hereinbefore contained, then—

for children equally;

—on failure of children,

55 *i*[8]. In trust for all and every or such one or more of my other children who shall be living at the decease of such daughter, or the issue who shall be living at such decease of any child or children of mine then living or dead, and if more than one, in such parts, shares, and proportions, and subject to such provisoes and restrictions, and in such manner and form in all respects as each such daughter of mine shall at any time or times, whether covert or sole, by any deed or deeds, revocable or irrevocable, to be duly executed, or by her last will and testament in writing, or any testamentary writing, direct or appoint (*a*); But so, nevertheless, that no object of this present power of either sex shall take or acquire any transmissible interest, by virtue of any appointment by deed as aforesaid, until such appointee shall have attained the age of twenty-one years, or shall have married; And, in default of such direction or appointment, and subject to any

for testator's other children or issue living at decease of daughter, as she shall appoint;

—and in default of appointment,

(*a*) These trusts exhibit that inequality between the shares of sons and daughters, which has been the subject of remark in a former note, ante, p. 682.

partial direction or appointment of the said trust-monies, funds, and securities, then as to the said trust-monies, funds, and securities, (including any accruing or additional share or shares which shall or may have been acquired by virtue of this present clause), I DIRECT AND DECLARE that my said trustees or trustee for the time being shall stand and be possessed thereof, and the annual produce and income to arise therefrom, upon the same or the like trusts, and for the same or the like intents and purposes, as are hereby declared concerning the other or remaining parts or shares of my said residuary estate, or such of the same trusts, intents, and purposes as shall happen to be subsisting or capable of taking effect; Save and except only, that the whole or entire share accruing to any and every daughter of mine under or by virtue of this present clause, shall be subject to the trusts and restrictions hereby declared concerning one moiety of the original share of such daughter respectively.

upon the same trusts as are declared concerning the other shares;

—hotchpot clause;

55 *i*[9]. PROVIDED ALSO, AND I FURTHER DECLARE, that no child of any daughter of mine, in whose favour any appointment shall be made by such daughter as aforesaid, shall, unless such appointment shall expressly so direct, be entitled to share or participate in the unappointed part (if any) of the trust-premises, without bringing his or her appointed share or interest into hotchpot or distribution, any rule of equity to the contrary notwithstanding.

—maintenance of children and issue of daughters (whose life interests are liable to forfeiture);

55 *i*[10]. PROVIDED ALSO, AND I FURTHER DIRECT AND DECLARE, that in case at the determination by death or otherwise of the interest of any daughter of mine in the said trust-monies, funds, and securities, or in case at any period after such determination (*a*) during the life of such daughter, any of her children, grandchildren, or other issue, who, under the trusts hereinbefore contained, or under any appointment or appointments to be made in his, her, or their favour, by virtue of the power hereinbefore contained, shall be entitled to any vested or presumptive share or respective shares of the said trust-monies, funds, and securities, being a male or males, should not have attained the age of twenty-one years, or, being a female or females, should not have attained that age or been married, then (subject and without prejudice to any contrary

(*a*) These words are rendered necessary by the provision which makes the daughters' life interests determinable before their decease.

direction or regulation in any such appointment) it shall be lawful for the trustees or trustee for the time being of the share of such daughter in the said trust-monies, funds, and securities (*a*), in their, his, or her discretion, from time to time to apply all or any part of the annual produce and income of the vested or presumptive share of each such child, grandchild, or issue, being a male, during his minority, or, being a female, during her minority and discoverture, in or towards his or her maintenance and education, or otherwise for his or her benefit; And I declare, that it shall not be incumbent on the said trustees or trustee to inquire as to the applicability of any other fund, or the liability of any existing parent of the said minor or minors respectively to provide such maintenance; And that (subject as aforesaid) so much (if any) of the annual produce and income arising from the share or presumptive share of each such child, grandchild, or issue respectively as shall not be so applied as aforesaid, shall be improved at interest and accumulated, and the accumulations thereof, or so much of the said accumulated fund as for the time being shall remain unapplied for such maintenance as aforesaid, shall be added to the principal of the share whence the same shall have arisen, but at any time or times shall be applicable, at the discretion of the said trustees or trustee, to the maintenance of the person or persons for the time being actually or presumptively entitled thereto.

—trustees not to be bound to enquire as to ability of minor's father, &c.;

55 *i* [11]. Provided also, and I further declare, that it shall be lawful for the said trustees or trustee for the time being, during the life of each daughter of mine, and so long as she shall be interested in the annual produce and income from the said trust-monies, funds, and securities, with her consent in writing, and after the death of such daughter or after the determination of such her interest, then in the discretion of the said trustees or trustee, to apply any part not exceeding one-half of the principal or value of the vested or presumptive share of each or any of the children, grandchildren, or issue of such daughter in the said trust-monies, funds, and securities, under or by virtue of the trusts hereinbefore contained, or under or by virtue of any appointment or appointments to be made as aforesaid (subject, nevertheless, to

—advancement;

(*a*) It will be observed, that, under the special power of changing trustees referred to below, the shares of the daughters may become vested in distinct classes or sets of trustees.

any contrary direction or regulation therein contained) for the apprenticing of such child, children, or issue respectively, to any profession, trade, or business, or otherwise in and towards his, her, or their advancement or preferment in the world, in such manner as the said trustees or trustee, in their, his, or her discretion, shall think proper.

—power to daughters to bequeath life-interests to husbands;

55 *i* [12]. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for any and every daughter of mine, notwithstanding all and every or any of the trusts hereinbefore contained, and in derogation of the same trusts, by her last will and testament, or any testamentary writing, to bequeath to any husband who may happen to survive her, during his life, any part or share not exceeding one moiety or equal half part of the annual produce and income of the share or fund whereof the annual produce and income is hereby made payable to such daughter; And also, subject to the trust hereinbefore declared in favour of the children of such daughter, and without prejudice thereto (*a*), to bequeath to such husband during his life as aforesaid, the other or remaining moiety or equal half part of such annual produce and income.

—proviso for cesser of life-interest of any daughter who shall assign her share;

55 *i* [13]. PROVIDED ALSO, AND I FURTHER DIRECT AND DECLARE, that, if by reason of the discoverture of any daughter or daughters of mine respectively at the time of my decease or afterwards, the restraint on anticipation hereinbefore imposed on her or them respectively should be or become suspended or inoperative, and if any such daughter should at any time or times after my decease, assign, charge, or in any manner dispose of the annual produce and income hereinbefore made payable to her or them respectively, or any part thereof, or should do, commit, or suffer any act or default by reason or means whereof the said annual produce and income hereby made payable to her or any part thereof or interest therein would, but for this proviso, become vested in or payable to any other person or persons (*b*), then, and in any of the cases

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(*a*) The effect of this power, it will be observed, is to enable the daughters by will to bequeath a *moiety* of the income to any husband as against the children, and the *entirety* as against all other objects of the trusts.

(*b*) The following shorter form would be equally effectual:—

Shorter form of proviso for cesser.

"PROVIDED ALWAYS, AND I FURTHER DECLARE, that if by any act or default of such daughter while discovert, or by any

aforesaid, the trust hereinbefore declared in favour of such daughter shall immediately thereupon cease and determine, and the annual produce and income to which she shall be or would have been entitled shall thenceforth, during her life, be paid and applied by the said trustees and trustee for the time being for the benefit of [such daughter or daughters respectively, and] (*a*) the person or persons who would for the time being be entitled thereto by virtue of the trusts aforesaid, if such daughter were actually dead without having exercised either of the powers of appointment hereby vested in her, or to or for the benefit of some or one exclusively of the other or others of the said several objects, and in such proportions (if divided among more than one) and in such manner in all respects as the said trustees or trustee in their, his, or her uncontrolled discretion shall think proper. NEVERTHELESS, I DECLARE, that no actual distribution or transfer of the capital of the said trust-monies, funds, and securities, or any share or part thereof, shall be made unto or among the child or children of any daughter of mine until the decease of such daughter, [or until she shall have attained the age of fifty years,] to the intent that any child or children of any such daughter who may happen to be born after the determination of her interest under the aforesaid proviso may not be excluded (*b*).

—in case of cesser of daughter's life interest, fund not to be distributed before her death;

55 *i* [14]. PROVIDED ALSO, AND I FURTHER DIRECT AND DECLARE, that in case any daughter or daughters of mine should marry before her or their attainment to the age or respective ages of twenty-one years, it shall be lawful for the trustees or trustee for the time being of my will, if they, he, or she should deem it expedient so to do, to settle the whole, or any part of the moiety or half part hereinbefore bequeathed absolutely to each such daughter respectively, of her share in the said trust-monies, funds, and securities, upon such trusts, for the benefit of such daughter so marrying and her intended husband and

—power to trustees to settle the other moiety of shares of daughters marrying under age;

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other means whatsoever, the said income arising from the said trust-premises hereby made payable to her, or any part thereof, would, but for this power, become payable to any person or persons other than such daughter, then, and in any and every such case, the trust hereinbefore declared," &c.

(*a*) [Vide ante, pp. 486, 548, 552.]

(*b*) [Vide ante, pp. 319, 517.]

children or more remote issue, or for the benefit of one or more exclusively of the other or others of those several objects, and in such manner and form in all respects, and with such accompanying powers, provisions, and declarations as my said trustees or trustee in their, his, or her uncontrolled discretion shall think proper (whether my daughter so marrying as aforesaid should concur in and consent to the settlement to be made by my said trustees or trustee or not). And I direct, that the expense attending any and every settlement hereby directed or authorised to be made, shall be paid and deducted out of the capital or principal of the trust-funds and premises to which the same shall or (but for this present clause) would relate.

—exoneration of persons paying trust-monies to trustees of daughters' shares.

Provided also, and I further declare, that all and every person and persons paying any monies or transferring any stocks, funds, or securities to the trustees or trustee for the time being of the respective shares of my daughters in the said residuary personal estate, stocks, funds, and securities, shall be exempt from all responsibility in respect of the application thereof. (*Add power to appoint new trustees in respect of daughters' shares, post,* Trustee clauses).

Testator's estate to be principally applied in payment of annuities and legacies settled for the benefit of the testator's sister, wife, and children.

55 *k*. *Legacies to children* (35) (38 *i*); *Life annuities to testator's mother and sister; Income of residue to testator's wife during widowhood—after her death or marriage to raise the other legacies, and also a legacy for a married daughter and her children; Power to widow to appoint a specified sum among children; Residue in trust for children living at testator's death; Proviso for abatement of legacies in case of deficiency of funds; Authority to set apart funds for annuities; Provision for wife to be for maintenance of children* (21 *a* [1]) *to* (21 *a* [7]) (*a*).

Trust for all testator's children, except the eldest son or other child taking the real estates;

55 *l* [1]. In trust for all and every my children and child living at my decease (except my said son [*name*], or any other child of mine being an eldest or only son, or an eldest daughter, at my decease entitled in possession under the limi-

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(*a*) [The limitations above referred to have been given among the forms relating to annuities, on account of the special provisions contained in them for securing the annuities, and for abatement, &c. They are referred to here as an example of a mode of dealing with the general personal estate, by giving the principal part of it in the form of annuities and legacies of specified amounts.]

tations hereinbefore contained of my real estates), in manner following, (that is to say), If there should be but one such child of mine, (except as aforesaid), the said trust-monies, funds, and securities, and the annual produce and income thereof, shall be IN TRUST for such only child, and be paid or transferred to such child, being a son, at his age of twenty-one years, or, being a daughter, at her age of twenty-one years, or on the day of her marriage with the consent of her guardian or guardians for the time being, which shall first happen; And if there should be two or more such children, then the said trust-monies, funds, and securities, and the annual produce and income thereof, to be IN TRUST for such two or more children, and to be divided between or among them in equal shares or proportions; and the share or shares of such of them as shall be a son or sons to be paid or transferred to him or them respectively at his or their age or respective ages of twenty-one years, and the share or shares of such of them as shall be a daughter or daughters to be paid or transferred to her or them respectively at her or their age or respective ages of twenty-one years, or day or respective days of marriage with such consent as aforesaid, which shall first happen.

—accruer of share of any child dying or becoming an elder child during minority;

55 *l*[2]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that if there should be more than one child for whom portions are hereby intended to be provided as aforesaid, and any of them, being a son or sons, should depart this life or become an eldest or only son for the time being entitled in possession under the limitations hereinbefore contained of my said real estates, under the age of twenty-one years, or, being a daughter or daughters, should depart this life or become an eldest daughter for the time being entitled in possession as aforesaid, under the age of twenty-one years, and without being or having been married with such consent as aforesaid, then, as well the original share intended to be hereby provided for, as the share or shares by virtue of this present clause or proviso surviving or accruing to each such child so dying or becoming an eldest or only son or an eldest daughter for the time being entitled as aforesaid, or so much thereof as shall not have been applied for the preferment or advancement in the world of any such son, in pursuance of the power or authority hereinafter for that purpose contained, shall from time to time go, accrue, and belong to the others or other of such children

(other than my said son [*name*], or any other eldest or only son or eldest daughter for the time being entitled as aforesaid), and if more than one in equal shares or proportions, and be paid and transferred at such and the same time or times, and in such and the same manner, as his, her, or their original share or shares of and in the said trust-monies, funds, and securities, and the annual produce and income thereof, is and are hereinbefore bequeathed and made payable or transferable (*a*).

Remarks upon the clause of accruer where the child taking the estate is to be excluded.

(*a*) The plan commonly pursued in these forms has been, for the sake of brevity, to suspend the vesting of children's shares until the age prescribed for enjoyment, instead of giving to the children on their birth vested interests, accompanied by a clause of accruer in the event of their dying before attaining such age. In the present instance, however, the latter mode is to be preferred, inasmuch as it prevents accruing shares from devolving to a younger child, who has become the eldest in the interval between the vesting of his original share and the acquisition of such accruing share. For example, suppose that there are, at the testator's decease, four younger children; namely, A., who has attained majority, and B., C., and D., who are under age. The eldest son, after the testator's decease, dies without issue, by which event A. becomes the eldest existing son, and takes the estate; B. afterwards dies during minority. It is clear, that, under such circumstances, the clause of accruer in the text would not admit A. to a participation in the share of B., he having, before such clause took effect, ceased to answer the description of younger child. On the other hand, if the original trust had been so framed as to embrace such children only (other than an eldest son), as, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, A., having attained the prescribed age, would have been entitled on the death of B., notwithstanding his having antecedently become the eldest son, to a share of that part of the fund which became distributable on B.'s death, *as part of his* (*A.'s*) *original share*, such share having previously vested in him as a younger son of the testator, though with a deferred enjoyment, during the life of B., of that portion of it which was included in the presumptive share of B. while he continued an expectant member of the class. This evidently would be contrary to the intention.

Suggestions as to the framing of clauses of accruer.

In framing clauses of accruer, two points especially demand the attention of the draftsman: they are—First, explicitly to shew that the clause is to operate in favour, not exclusively of survivors properly so called, but also of those who may have antecedently died, (their death having occurred under such circumstances as not to divest their shares), which it may be presumed is the invariable intention of every testator, by or on behalf of whom such a clause is penned. Indeed, so strong has been the conviction of this, that, for the purpose of effecting the object, the Courts have always gladly availed themselves of any ground afforded by the context for reading the word "survivor" as synonymous with "other." Vide ante, p. 375.

55 *l*[3]. PROVIDED ALSO, AND I HEREBY DIRECT, that, in the meantime and until my said child or children respectively for whom a portion or portions is or are intended to be hereby provided under the trusts hereinbefore declared of the said trust-monies, funds, and securities, shall become entitled to the payment or transfer of his, her, or their portion or portions respectively, my said trustees or trustee for the time being shall pay or apply all or any part of the annual produce and income of the portion or portions to which each such child shall or may for the time being be entitled in expectancy under the trusts aforesaid, for or towards his or her maintenance and education. —maintenance during minority;

55 *l*[4]. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said trustees or trustee, at any time or times before the age or period of payment or transfer of the portion or portions hereinbefore provided for each of my said sons respectively (except as aforesaid), at their or his discretion, to pay and apply any part or parts, not exceeding one moiety or equal half part of the portion to which any such son shall or may for the time being be entitled in expectancy under the trusts aforesaid, for or towards his advancement or establishment in the world. —advancement;

55 *l*[5]. PROVIDED ALSO, AND I FURTHER DECLARE, that if I should have no child living at my decease, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry with such consent as aforesaid, (other than an only son or daughter entitled for the time being as aforesaid), then and in such case the whole of the aforesaid trust-monies, funds, and securities, or such part thereof as shall not be applied or disposed of under the power of advancement hereinbefore contained, shall go and be IN TRUST for such only son of mine or only daughter living at my decease, to be paid or transferred to such son at his age of twenty-one years, or to such daughter at her age of twenty-one years or marriage under that age with such consent as aforesaid. AND in case such only son should die under the age of twenty-one years, or such only daughter should die before she shall attain that age or marry with such consent as aforesaid, or in case I should have no child living at my decease, the same trust-monies, funds, and securities, or such part thereof as shall not be applied or disposed of under the power of advancement hereinbefore contained (as the case may be), shall go and be IN TRUST for [*ulterior legatee*]. —if no younger children, for only son; —if no son, for only daughter; —ultimate trust, if no child;

—accumulation of income unapplied to maintenance.

55 l^6. PROVIDED ALWAYS, AND I DECLARE, that, in the meantime and until the said trust-monies, funds, and securities shall vest absolutely in, and become payable or transferable to, some person or persons under the trusts hereinbefore declared concerning the same, my said trustees and trustee shall from time to time receive the annual produce and income of the said trust-monies, funds, and securities, or of the invested or unapplied part or parts thereof, and lay out and invest the same, or so much and such part thereof as shall not be applied for the maintenance or education of any child or children of mine under the aforesaid power or authority in that behalf, in the names or name of such trustees or trustee, in the public stocks or funds of Great Britain, or at interest upon real securities in England or Wales, and not in Ireland, and shall receive the annual produce and income of the last-mentioned stocks, funds, and securities, and lay out and invest the same in or upon other stocks, funds, or securities of the like nature (my said trustees or trustee varying and transposing the said stocks, funds, and securities from time to time as occasion shall require, or as they or he shall think proper), and shall from time to time repeat such investments, so that all the resulting income and produce for the time being may, during such suspense of vesting as aforesaid, accumulate in the way of compound interest; AND I DECLARE, that the said annual produce and income, trust-monies, funds, and securities, and all the accumulations of the same, shall go and be IN TRUST for the person or persons who, under the trusts hereinbefore declared, shall become absolutely entitled to the funds from which the same respectively shall have proceeded, and be considered part thereof respectively; Nevertheless, I declare, that the said accumulated fund shall continue and be subject and liable to be applied for the maintenance and education of the child or children respectively who for the time being shall be presumptively entitled thereto.

Legacy of £—— out of residue, in trust for children or issue, as wife shall by will appoint;

55 m^1. (*Annuity to widow*, (19 *o*)).—AND AS TO the sum of £—— sterling, part of the said trust-monies, and the funds and securities on which such sum shall be invested, IN TRUST for all and every or such one or more, in exclusion of the other or others of my children or more remote issue, (such issue being born in the lifetime of my said wife or within twenty-one years after her decease), and in such shares and proportions, and to vest and be paid at such age or ages, and in such

manner, and subject to such powers, conditions, and restrictions, as my said wife, whether covert or sole, by her last will in writing, or any codicil thereto, or any testamentary writing, shall appoint. And in default of any such appointment, or so far as the same, if incomplete, shall not extend, then, as to the same sum of £——, or any part thereof to which such incomplete appointment shall not extend, upon the same trusts, and to and for the same intents and purposes, as are hereinafter declared or referred to concerning the residue of the said trust-monies, funds, and securities.

—in default of appointment, to fall into the residue;

55 m^2. And as to all the residue of my said personal estate, and the stocks, funds, and securities whereon the same for the time being shall happen to be invested, and also as to the funds to be appropriated and set apart to answer the said several annuities of £—— and £—— to my said wife, when and as the same shall respectively determine or fail to take effect, In trust for such child of mine or such of my children as at the time of my decease shall have attained the age of twenty-four years or been married, or as shall afterwards live to attain the age of twenty-four years or marry under that age, and the issue of such of my children as shall die in my lifetime leaving issue who shall survive me and attain the age of twenty-four years or marry, which shall first happen, as tenants in common, such issue of each child, nevertheless, only taking between or among them, and as tenants in common, the part or share which his or her respective parent would have taken or been entitled to if he or she had lived to gain a vested interest therein; and if there should be but one such child or issue, then the whole to that one child or issue.

—residue in trust for testator's children and issue attaining twenty-four, or marrying, per stirpes;

55 m^3. Provided always, and I hereby direct and declare, that if any son of mine should during my lifetime or after my decease marry under the age of twenty-four years without my consent, or without the consent in writing of his guardians or guardian if such son should be under the age of twenty-one years, or if he should have attained the age of twenty-one years, then of my trustees or trustee for the time being, or of the majority of such guardians or trustees if more than one, or should fail to obtain my consent or sanction during my life, or after my decease should fail to obtain the consent or sanction in writing of such guardian or trustee, or of the major part of such guardians or trustees if more than

—share of son, marrying under twenty-four without consent, not to vest absolutely on marriage;

one, to such marriage, within the space of two years next after the same marriage shall have taken place, as the case may require (*a*), then, and in every such case, his said portion or share, as well original as accruing or surviving, of and in the said trust-monies, funds, and securities, shall not vest in such son absolutely, but, in lieu thereof, my said trustees or trustee for the time being shall pay and apply unto or for him such part or parts of the annual produce and income of the said portion or share as my said trustees or trustee for the time being shall deem proper, until such son of mine shall attain the age of twenty-four years, at which time I DIRECT that the principal monies, funds, and securities thereof, and the unapplied income, shall vest in him, and be paid and transferred accordingly; But in case such son should die under the age of twenty-four years, leaving a widow and one or more child or children him surviving, or leaving one or more such child or children only, then I DIRECT that his said part or share of and in the said trust-monies, funds, and securities, or so much thereof as shall not have been applied under the power hereinafter contained, shall be and remain upon and for the several trusts, intents, and purposes following, (that is to say), In case such son should leave a widow and also one or more child or children as aforesaid, IN TRUST as to one moiety or half part of the annual produce and income thereof, for such widow, for and during her natural life, to be paid and payable at such times and in such manner, and subject to such powers, conditions, and restrictions, as such son, by his last will and testament, or any testamentary writing, shall appoint; And in default of such appointment, or so far as any such appointment, if incomplete, shall not extend, UPON TRUST to pay unto, or otherwise to permit, authorise, and empower such widow to receive the same annual produce and income when and as the same shall from time to time become due and payable, or be received or receivable, for and during the term of her natural life, unless such son, by his

—but son to take the income only until twenty-four;

and if he die under twenty-four,

in trust as to one moiety for widow during life, as son by will shall direct;

and in default, to pay income to widow for life,

(*a*) Unless it is expressly so provided, *subsequent* approbation will not satisfy a condition requiring marriage to take place with consent, which ordinarily is construed to mean *previous* consent. [As to the doctrine respecting marriage conditions in general, see 1 Jarm. on Wills, 836; *Rushton* v. *Cobb*, 5 Myl. & Cr. 145, and the important case of *Grace* v. *Webb*, 12 Jur. 987.]

last will, or any testamentary writing, shall declare the contrary. And, as to the said part or share of such son of and in the said trust-monies, funds, and securities, (subject to the interest of the widow of such son in the annual produce and income of any part thereof, if there should be any such widow, and she should become entitled thereto as aforesaid), In trust for all and every or such one or more of the children of such son so dying, in such shares and proportions, and to vest and be paid at such ages or times, and in such manner, and subject to such powers, conditions, and restrictions, as such son, by his last will and testament, or any testamentary writing, shall appoint; And in default of such appointment, or so far as any such appointment, if incomplete, shall not extend, In trust for all and every or such one or more of the children of such son so dying as aforesaid as shall live to attain the age of twenty-one years or to be married, whichever shall first happen, to be divided between or among them, if more than one, in equal shares and proportions; And if there should be but one such child, then the whole shall be In trust for such only child; But in case such son so marrying without such consent, or failing to obtain such sanction as aforesaid, should die under the age of twenty-four years, leaving a widow only, and not leaving any child him surviving who shall live to attain the age of twenty-one years, or to be married, then I direct that one moiety or equal half part of the part or share of such last-mentioned son of and in the said trust-monies and securities, shall be In trust for such person or persons, in such shares and proportions, and for such interest or interests, and in such manner, and subject to such powers, conditions, and restrictions, as such son, by his last will and testament, or any testamentary writing, shall direct or appoint: And in default of any such appointment, or so far as any such appointment, if incomplete, shall not extend, In trust for the widow of such son, her executors, administrators, or assigns; And the remaining moiety or half part of the part or share, as well original as accruing, of such son so dying of and in the said trust-monies and securities, or in case such son should happen to die without leaving any widow or child surviving, then the entirety or whole of his said part or share, as well original as accruing, of and in the said trust-monies and securities, shall sink into and become part of my residuary personal estate and effects for the benefit of the others or other of my children,

subject thereto, as to the entire share, for the children of son, as he by will shall direct, and in default of appointment, equally;

—if he leave a widow only, then one moiety as he by will shall appoint;

—and in default for his widow absolutely, the other moiety to go to testator's other children;

or their, his, or her issue or appointees, to be held upon and subject to the trusts and purposes herein expressed concerning the original share or shares of such other children and issue respectively of and in the said trust-monies and securities.

—if daughters marry under twenty-four, without consent, their shares not to vest absolutely on marriage;

55 m^4. PROVIDED ALWAYS, AND I HEREBY DIRECT AND DECLARE, that, if any of my daughters should, in my lifetime or after my decease, marry under the age of twenty-four years, without my consent, or without the consent in writing of her guardians or guardian for the time being, if such daughter should be under the age of twenty-one years, or, if she should have attained the age of twenty-one years, then of my trustees or trustee for the time being, or of the majority of such guardians or trustees if more than one, or should fail to obtain my consent or sanction during my life, or after my decease should fail to obtain the consent or sanction in writing of such guardian or trustee, or of the major part of such guardians or trustees (if more than one), to such marriage, within the space of two years next after the same marriage shall have taken place, as the case may require, then and in such case the portion or share of every such daughter, as well original as accruing or surviving, of and in the said trust-monies and securities, shall not vest in her absolutely, but, in lieu thereof, my trustees or trustee for the time being shall pay and apply unto or for her sole and separate use, as hereinafter mentioned, the whole or such part or parts of the annual produce and income of her said portion or share as my said trustees or trustee for the time being shall deem proper, until such daughter shall attain the age of twenty-four years, at which time my said trustees or trustee shall pay unto such daughter for her sole and separate use, as hereinafter mentioned, the unapplied surplus (if any) of the said annual produce and income, and also shall thenceforth pay the whole of the said annual produce and income, when and as the same shall from time to time become due and payable, into the proper hands of such daughter, so that the same may be for her sole and separate use and benefit, free from the control, debts, and engagements of her husband for the time being, and so that such daughter may not have power to alienate, dispose of, engage, or receive the same or any part thereof by way of anticipation, [but to be applied and disposed of in such manner and to and for such intents and purposes in all respects as such daughter, notwithstanding coverture, shall from time to

but each such daughter to take the interest only during life for her separate and inalienable use;

time as the same shall actually become due and payable, and not before, by any writing under her hand, direct, order, or appoint; and her receipts, notwithstanding coverture, or the receipts of the person or persons to whom she shall so appoint the same, shall from time to time be sufficient discharges for the same (*a*)]; And in case the husband of such daughter should die in her lifetime, and she should then have attained or should afterwards attain the age of twenty-four years, then from and immediately after such decease of her husband or her attaining the age of twenty-four years (as the case may be), whether there be any child of such marriage or not, Upon trust to pay, assign, or transfer unto such daughter the principal or capital of her said portion or share of and in the said trust-monies, funds, and securities; But, if such daughter should depart this life without having attained the said age of twenty-four years, or if such daughter should happen to die in the lifetime of her husband, then I direct, that, from and immediately after her decease, the said portion or share of such daughter shall be In trust for all and every or such one or more of the children or more remote issue of such daughter, in such proportions, and to vest and be paid and payable at such age or ages or times, and in such manner and form, and under and subject to such powers, conditions, and restrictions as such daughter, whether sole or married, shall in and by her last will and testament, or any testamentary writing (*b*), appoint; And, in default of such last-mentioned appointment, or so far as any such appointment, if incomplete, shall not extend, In trust for all and every the child and children of such last-mentioned daughter who shall live to attain the age of twenty-one years, or marry under that age (whichever shall first happen), equally to be divided between or among them, if more than one, share and share alike; and if there should be but one such child, then the whole to be in trust for such only child; But if such daughter dying under the age of twenty-four years, or in the lifetime of her husband, as aforesaid, should have no child who should attain the age of twenty-one years or marry, then I

—if she survive her husband and attain twenty-four, her share to vest absolutely;

but if she die under twenty-four, or before husband, in trust for her children and more remote issue, as she by will shall appoint;

—in default of appointment, in trust for her children attaining twenty-one or marrying;

—if no child, to be added to the other shares of the residue, subject as to one moiety to a general power of testamentary appointment in the daughter;

(*a*) [This direction as to receipts is quite superfluous.]

(*b*) Here, it will be observed, the power of selection is confined to appointment *by will;* as to which, vide an observation, ante, p. 682.

direct and declare that one moiety or equal half part of the said part or share of such daughter of and in the said trust-monies, funds, and securities, shall sink into and become part of my residuary personal estate and effects as hereinafter mentioned, and the other moiety or equal half part thereof shall be IN TRUST for such person or persons, in such parts, shares, and proportions, and for such interest or interests, and in such manner, and under and subject to such powers, conditions, and restrictions, as such daughter, notwithstanding coverture, shall in and by her last will and testament, or any testamentary writing, appoint; And in default of any such appointment, or so far as any such appointment, if incomplete, shall not extend, the same moiety or equal half part, or so much thereof as shall not be completely appointed, shall sink into, and, together with the other moiety or equal half part thereof, become part of my residuary personal estate and effects, for the benefit of the other or others of my children, and their, his, or her issue or appointees, entitled to the other shares of my residuary estate, and be held upon, and subject to, the trusts and purposes herein expressed concerning the original share or shares of such other children and issue respectively of and in the said trust-monies, funds, and securities, including this present trust.

—accruer of shares of residue;

—maintenance of testator's issue out of income or capital;

55 m^5. PROVIDED ALWAYS, AND I HEREBY FURTHER DIRECT, that, in the meantime, and until the share or shares of my children or more remote issue respectively shall become vested and transferable, the annual produce and income, and, if deemed necessary, but not otherwise, any part not exceeding one equal fourth part of the principal, of the presumptive or expectant share of each such child or issue respectively of and in the said trust-monies, funds, and securities, or so much thereof as shall by my said trustees or trustee for the time being or the major part of them (if more than one) be deemed or considered as requisite or necessary, shall be applied by such trustees or trustee, or, in their or his discretion, by the respective guardians or guardian of such child, children, or issue (if there shall be any such, and if my said trustees or trustee shall think proper to pay the same to such guardians or guardian, instead of themselves applying the same), for or towards the maintenance and education of such child, children, or issue respectively so entitled in expectancy; And the residue of such interest or dividends (if any) shall from time to time be laid

out at interest, to accumulate for the benefit of the same child, children, or issue respectively, or other the person or persons who shall ultimately be entitled under the trusts of this my will to the principal from which such accumulation shall arise. But such accumulation shall at any time or times be applicable at the discretion of my said trustees or trustee for or towards the maintenance and education of the person or persons for the time being presumptively or actually entitled thereto. PROVIDED NEVERTHELESS, AND I HEREBY DECLARE, that my said trustees or trustee shall not be bound to see to the application of any monies paid to any guardian or guardians under the authority of the last-mentioned proviso, nor to inquire whether the objects of the aforesaid provision are entitled to be provided for and maintained by any other person or persons or out of any other funds whatsoever.

—trustees not answerable for application of maintenance-money or for ability of father, &c.;

55 *m* [6]. PROVIDED ALWAYS, AND I HEREBY FURTHER DIRECT, that it shall be lawful for my said trustees or trustee for the time being, or the major part of them (if more than two), with the consent of the guardians or guardian for the time being (if any), or the major part of them (if more than two), of my said children or issue respectively, or, if there should not be any guardian or guardians, and after my children shall have attained the age of twenty-one years, then of the proper authority of my said trustees or trustee for the time being, to advance and apply any part or parts of the respective probable or presumptive portion or share, portions or shares, of such child or issue respectively of and in my said trust-monies, funds, and securities (not exceeding the sum of £—— for each such child or issue), for the putting or placing him or her as a clerk or apprentice in or to any profession, trade, or business, or otherwise for his, her, or their benefit or advancement in the world, and also to advance to such of my said children or issue as shall settle in business with the consent or approbation of my said trustees or trustee for the time being, and shall have attained the age of twenty-one years, the whole or any part or parts of such presumptive or expectant portion or share, portions or shares, although such child or children or issue respectively should not, at the time or respective times of advancing or applying the same for any or either of the purposes aforesaid, have acquired a vested interest or vested interests therein.

—advancement by majority of trustees.

55 *n* [1]. IN TRUST for such of my children as shall attain the

Trust for children;

age of twenty-one years, and the issue who shall attain that age of such of my children as shall die in my lifetime, or shall after my decease die under the age of twenty-one years, as tenants in common, such issue nevertheless (including as well children of more remote issue) only taking amongst themselves per stirpes, as tenants in common, the part or share which his, her, or their deceased parent or ancestor would have been entitled to receive, if such parent or ancestor had lived to acquire a vested interest therein, it being my intention that no issue of any degree shall take any interest concurrently with but only in the place of his, her, or their parent or ancestor (*a*); but if there should be only one such child or issue, then the whole thereof to be in trust for such only child or issue.

—until vesting, income of presumptive shares to be applied for maintenance;

55 *n* [2]. PROVIDED ALWAYS, AND I HEREBY FURTHER DIRECT, that in the meantime and until the share or shares of my children or issue respectively shall become vested or transferable under the trusts aforesaid, the annual produce and income of the presumptive or expectant share of such child or issue respectively of and in the said trust-monies, funds, and securities, or so much thereof as shall by my said trustees or trustee for the time being be deemed or considered as requisite or necessary, shall be applied, by or under the direction and guidance of the guardian or guardians (if any) of such child, children, or issue; or, if none, then at the discretion of such trustees or trustee for or towards the maintenance and education of such children or issue respectively so entitled in expectancy; And the residue of such annual produce and income shall from time to time be laid out at interest to accumulate for the benefit of the same child, children, or issue, or other

—accumulation;

As to whether issue are to take per stirpes or per capita.

(*a*) In a former note, the reader's attention was directed to the necessity of distinguishing plainly between gifts to children and gifts to issue, ante, p. 517. In regard to the latter, another caution may here be added. Where the intention is to let in issue of every degree (and unless such is the intention the word ought not to be used at all), it should be made distinctly apparent whether the issue are to take per stirpes or per capita. The former, probably, is usually intended; for a testator seldom means that all the individuals of every stock of issue shall be entitled pari passu: each stock, whatever may be the number of individuals composing it, is intended to be restricted to the share belonging to its head or ancestor, no person being admitted to a participation in the lifetime of and concurrently with, but only in the room of, his or her parent.

person or persons who shall ultimately be entitled under the trusts of this my will to the principal from which such accumulation shall arise; But such accumulated fund, notwithstanding the investment thereof, shall continue and be applicable to the maintenance and education of the child or children or other issue for the time being presumptively entitled thereto.

55 n^3. PROVIDED ALSO, AND I FURTHER DIRECT, that it shall be lawful for my said trustees or trustee for the time being, with the consent of the guardians or guardian for the time being (if any) of my said children or issue respectively, or, if there should not be any guardian, then of the proper authority of my said trustees or trustee, to advance and apply any part or parts of the presumptive or expectant portion or share, portions or shares, of any such child or issue respectively, of and in the said trust-monies, funds, and securities, for the putting or placing him or her in or to any profession, trade, or business, or otherwise for his or her benefit or advancement in the world, although such child or issue respectively shall not, at the time or respective times of advancing or applying the same for any or either of the purposes aforesaid, have acquired a vested interest therein. —advancement;

55 n^4. PROVIDED ALWAYS, AND I HEREBY WILL AND DIRECT, that, if I should have no child or more remote issue who under the trusts herein contained shall live to acquire a vested interest in the said trust-monies, funds, and securities, and my said wife, [*name*], should be living and unmarried at the time of the failure of such children or issue, or should be living at the time of my decease, which shall last happen, then the whole of the said trust-monies, funds, and securities, or so much thereof as shall not have been applied under any of the powers herein contained, shall be IN TRUST for my said wife, her executors, administrators, and assigns; but, if my said wife should be then dead or married, then the whole of the said trust-monies, funds, and securities, or the unapplied part thereof, shall be IN TRUST for my sister, [*name*], of &c., her executors, administrators, and assigns. —in default of children, in trust for testator's wife, if living and unmarried, and if not, then in trust for testator's sister.

56 a^1. IN TRUST, in case my said son, [*name*], should survive me and live to attain the age of twenty-one years, or should die after my decease under that age, leaving issue living at his death, for him my said son, his executors, administrators, and assigns absolutely. In trust for son on his attaining twenty-one, or dying without leaving issue;

—maintenance and advancement of son during minority out of income or capital;

56 a^2. And I declare, that it shall be lawful for my said trustees or trustee for the time being to apply not only the annual produce and income but also any part of the capital of the trust-monies, funds, and securities [whereof my said residuary personal estate shall for the time being consist], or so much thereof as my said trustees or trustee shall deem sufficient, in, for, or towards the maintenance, education, and advancement, or otherwise for the benefit of my said son during his minority, in such manner as my said trustees or trustee shall think fit; And the surplus or residue thereof unapplied to the purposes aforesaid shall, from time to time, be invested by my said trustees or trustee in augmentation of the capital of the said trust-funds, and shall follow the destination thereof (*a*).

—if son die before testator, leaving issue,

56 a^3. But, in case my said son, [*name*], should happen to die in my lifetime and leave issue surviving me, then I declare, that my said trustees or trustee for the time being shall stand and be possessed of the said trust-monies, funds, and securities [whereof my said residuary personal estate shall for the time being consist, and also of the funds and securities in or upon which the monies to arise from the sale of the said farm and other hereditaments hereinbefore devised and appointed, as are hereinbefore directed to be invested]—

for son's children attaining twenty-one, or leaving issue;

56 a^4. In trust for such child or children of my said son, [*name*], as shall survive me and attain the age of twenty-one years, or die under that age leaving issue, and if more than one in equal shares and proportions.

—maintenance of son's children (including children taking as son's next of kin);

56 a^5. And I declare, that, in case my said son should die before me or under the age of twenty-one years, leaving issue, it shall be lawful for my said trustees or trustee for the time being to apply, as well as the annual produce and income, as also any part of the capital, of the presumptive or expectant share of each child of my said son, either under or by virtue of the foregoing limitation in case of the death of my said son in my lifetime, or as next of kin of my said

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As to provision for maintenance and advancement.

(*a*) [Here, it will be observed, the provisions for maintenance and advancement are united, the whole of the capital as well as the income of the fund being made applicable to either purpose. The usual authority to apply accumulations for future maintenance is therefore not needed. A provision of this kind is often very useful where the fund is small and the child will have to earn his living.]

son entitled under the Statute of Distributions, or so much of such income and capital respectively as my said trustees or trustee shall deem sufficient, in, for, or towards the maintenance, education, and advancement, or otherwise for the benefit of such child during his or her minority, in such manner as my said trustees or trustee shall think fit; And the surplus or residue thereof unapplied to the purposes aforesaid shall, from time to time, be invested by my said trustees or trustee in augmentation of the capital of the said share, and shall follow the destination thereof.

—in case of son's death under twenty-one, and without issue, trust premises to be held upon trusts following;

56 *a*[6]. But, in case my said son should happen to die before me, without leaving any child who shall survive me and attain the age of twenty-one years or leave issue, or in case my said son should survive me and die under the age of twenty-one years without leaving issue living at his death, then I declare, that my said trustees or trustee for the time being shall stand and be possessed [as well] of the said trust-monies, funds, and securities, [whereof my said residuary personal estate shall for the time being consist, as also of the funds and securities in or upon which the monies to arise from the sale of the said farm and other hereditaments hereinbefore devised and appointed are hereinbefore directed to be invested,] upon the trusts following, that is to say:

—as to one-fourth for wife absolutely,

—remaining three-fourths for three nieces, for their separate use for life, without power of anticipation;

56 *a*[7]. As to one equal fourth part thereof, In trust for my said wife, her executors, administrators, or assigns; and as to the remaining three equal fourth parts thereof, Upon trust, from time to time, to pay the annual produce and income arising therefrom unto my nieces, [*names*], in equal shares and proportions, the share of each of my said nieces in such income to continue for and during her life, and to be paid into her proper hands, so that the same may be for her sole and separate use and benefit, free from the control, debts, and engagements of her present or any future husband; And so that she may not have power to alienate, dispose of, engage, or receive the same by way of anticipation; And that her receipts may from time to time, notwithstanding coverture, be good and sufficient discharges for her share or portion of the said annual produce and income, which shall then have become payable and shall therein or thereby respectively be expressed to have been received.

—after the decease of nieces, in trust for their respective children;

56 *a*[8]. And, on the death of each respectively of them the said [*nieces*], I direct that the share of the said trust-monies, funds, and securities, in which such niece had a life

interest, shall be held IN TRUST for her respective child or children, to be equally divided between or among such children, if more than one, share and share alike; the share of each child, being a son, to be vested in and payable to him at his age of twenty-one years, or, being a daughter, at her age of twenty-one years or day of marriage, which shall first happen; And, in the meantime, the annual produce and income arising from the expectant or presumptive share of such child to be applied for his or her maintenance and education, in such manner as my said trustees or trustee shall think proper.

—maintenance;

—clause of accruer;

56 a^9. AND, in case any of them the said [*nieces*] should die without having had any child, or in case the child if only one, or both or all the children if more than one, of any one or more of them should die in my lifetime, or, being a son or sons, should afterwards die under the age of twenty-one years, or, being a daughter or daughters, should die under that age and without having been married, then the share of each or either of them the said [*nieces*] so dying, or of whose issue there shall be such failure as aforesaid, and also any additional share or shares which she or they shall or may from time to time have derived under this present limitation, shall be held on the same trusts, and with the same limitations over, as are hereby declared of the original share or shares of the other or others of them the said [*nieces*], [and by way or in the nature of cross remainders or limitations (*a*)]. And if there should not be any such child, or if the only child, or both or all the children if more than one, of them the said [*nieces*] should die in my lifetime, or, being a son or sons, should afterwards die under the age of twenty-one years, or, being a daughter or daughters, should die under that age and without having been married, then IN TRUST for such one of them the said [*nieces*] as shall have survived and outlived the other of them, and the executors, administrators, and assigns of such survivor.

—on total failure of objects, in trust for survivor.

Trust for step-daughter for separate and inalienable use for life; and after her decease,

56 b^1. UPON TRUST to pay the annual produce and income thereof unto my step-daughter, [*name*], wife of ——, for the term of her natural life, for her separate use, free from the control, debts, and engagements of her present or any future

(*a*) [These words seem to be quite out of place, and, if explanation were wanted, would be but an appeal from obscurity to darkness.]

husband, and so that she shall have no power to alienate or anticipate the same or any part thereof; and, after the decease of the said [*step-daughter*], to be possessed of the said trust-monies, funds, and securities, UPON TRUST for such person or persons, and to and for such intents and purposes, and in such manner and form in all respects as she the said [*step-daughter*], by her last will and testament, or any testamentary writing, shall appoint; And, in default of such appointment, and so far as any such appointment, if incomplete, shall not extend, UPON TRUST for the executors or administrators of my said step-daughter, [*name*], as part of her personal estate.

in trust for such persons as she shall appoint by will;

—in default, for her executors or administrators;

56 b^2. PROVIDED ALWAYS, AND I EXPRESSLY DECLARE, that, notwithstanding any of the trusts hereinbefore contained, it shall be lawful for the said trustees or trustee for the time being of this my will, if directed by the said [*step-daughter*] so to do by some attested writing under her hand, but not otherwise, to levy and raise, by sale of a competent part of the said trust-monies, funds, and securities, any sum or sums of money, not exceeding the sum of £—— sterling, and to pay and apply the money so to be levied and raised for the benefit of the present or any future husband of her the said [*step-daughter*], for his own proper use and benefit; But so, nevertheless, that, if the said [*step-daughter*] should survive her present husband, and should marry again, she shall be empowered to direct the raising, for the benefit of such future husband, of so much only of the said sum of £—— as shall not have been raised for and paid to her deceased husband or husbands.

—power to raise and pay £—— to daughter's husband.

56 c^1. As to one equal fourth part or share of the monies produced by or forming part of my residuary, real, and personal estate as aforesaid, IN TRUST for my said elder son, [*name*], for his own absolute use and benefit; [And in case he shall happen to die in my lifetime, then I give the said one fourth part or share unto the executors or administrators of the said [*elder son*], to be applied and disposed of as part of his personal estate (*a*), (*or substitute the next two clauses*)].

One-fourth for the elder son absolutely;

(*a*) [This provision against the possible event of the legatee dying before the testator goes further than the 33rd section of the Wills Act. It is rather more common, however, to substitute merely the children of the legatee, as in the clause (56 c^2).]

—clause substituting the children of the legatee in the event of his dying in the testator's lifetime;

56 c^2. And I hereby direct and declare, that, in case the said [*elder son*] should depart this life in my lifetime, leaving any child or grandchild who shall survive me, then and in such case my said trustees or trustee shall stand possessed of the said one fourth share of the said trust-monies and residuary estate, In trust for such child and children of my said son as shall survive me and attain the age of twenty-one years or die under that age leaving issue, and such child or children of any child of my said son dying before me as shall attain the age of twenty-one years or die under that age leaving issue, and if more than one, in equal shares and proportions as between brothers and sisters, for the absolute use and benefit of such child or children, grandchild or grandchildren respectively; but so that the child or the children collectively of any deceased child of my said son shall take only such share as his, her, or their parent would have taken if living.

—maintenance of son's issue;

56 c^3. And in case any of such children or grandchildren of my said son should, at the time of my decease, be under the age of twenty-one years and unmarried, then I direct that my said trustees or trustee shall lay out and invest the presumptive share of each such child or grandchild in the funds or on mortgage, and apply an adequate portion of the income arising therefrom for his or her maintenance and education, and from time to time accumulate and invest the unapplied portion thereof; which accumulated fund shall, notwithstanding the investment thereof, still remain applicable, if occasion shall require, for the maintenance and education of the person or persons for the time being presumptively entitled thereto.

—advancement;

And I also empower my said trustees or trustee, in their or his discretion, to apply any portion not exceeding one half of the presumptive share or respective shares of any of such children or grandchildren for his, her, or their advancement in life.

One other fourth to be invested upon trusts;

56 c^4. And as to one other equal fourth part or share of the monies produced by or forming part of my residuary real and personal estate as aforesaid, I direct and declare, that my said trustees or trustee shall lay out and invest the same, in their or his own names, in the public stocks or funds of Great Britain, or on real securities in England or Wales, and not in Ireland, with power from time to time to vary such investment as often as they or he shall think expedient; And shall stand

possessed of the said trust-monies, funds, and securities, of which the last-mentioned one fourth part or share of my said residuary real and personal estate shall happen to consist—

56 *c* [5]. In trust, from time to time, to pay the annual produce and income arising therefrom unto my younger son, [*name*], or permit or empower him to receive the same during his natural life for his personal use and benefit, subject to the proviso hereinafter contained. Provided always, and I hereby declare, that if the said [*younger son*] should alienate or dispose of the said annual produce and income or any part thereof or interest therein, or if, by reason of his bankruptcy or insolvency, or by any other means whatsoever (*a*), the said annual produce and income of the said trust-fund can no longer be personally enjoyed by the said [*younger son*], but the same or any part thereof shall, or, but for this present proviso, would belong to or become vested in some other person or persons, then the trust hereinbefore expressed concerning the said annual produce and income, or concerning so much thereof as shall or would have so become vested in any person or persons other than the said [*younger son*] as aforesaid, shall immediately thereupon cease and determine, and the same annual produce and income shall be applied by my trustees during all the then residue of the life of the said [*younger son*] in the manner following, (that is to say):

—for younger son for life;

—determinable on bankruptcy, alienation, &c.;

56 *c* [6]. Upon trust to pay and apply the said annual produce and income, or such part thereof as aforesaid, to and for the support and maintenance, or otherwise for the use and benefit, of the wife, child, or children for the time being, if any, of the said [*younger son*], or such one or more of such wife, child, or children, and in such manner as my said trustees or trustee, in their or his discretion, shall think proper, and as to such wife for her sole and separate and inalienable use;

to apply income for benefit of son's wife and children;

(*a*) The clause is expressed in these terms, with a view to avoid any question being raised by the event of the legatee becoming bankrupt in the testator's lifetime, and obtaining his certificate, which would clearly not interfere with his personal enjoyment; though the unqualified manner in which, in such clauses, future bankruptcy is often made to subject the legatee's interest to the operation of the proviso, might seem to render it doubtful whether bankruptcy, even under such circumstances, did not determine, or rather defeat, the trust. It is probable, however, that the literal force of the words would be made to bend to the evident intent.

Suggestion as to the terms of the proviso for cesser on bankruptcy, &c.

—if none, to accumulate;

And in default of any object of the last-mentioned trust, at any period during the life of the said [*younger son*], and when and so often as the same shall happen, then UPON TRUST, from time to time, so long as such vacancy or want of objects shall continue, to accumulate and invest the annual produce and income of the said trust-fund in augmentation of the principal or capital thereof, in the nature of compound interest; And in case, after the expiration of twenty-one years from my decease, such accumulation should cease to be lawful (*a*), then UPON TRUST, to apply the said annual produce and income, or such part thereof as may not lawfully be accumulated during such want of objects of the preceding trust as aforesaid, in such and the like manner as the same would be applicable under the ulterior trust hereinafter contained, if the said [*younger son*] were then actually dead. And from and after the decease of the said [*younger son*], UPON TRUST to pay the annual produce and income of the said trust-fund unto the present or any future wife of the said [*younger son*], who may happen to survive him, during the natural life of such wife; And, after her decease, UPON TRUST to transfer the capital of the said trust-fund unto or among such child or children of the said [*younger son*], whether born before or after the determination of his said life interest and shall attain the age of twenty-one years or die under that age leaving issue, for his, her, or their absolute use and benefit, and if more than in equal shares.

—proviso for cesser of accumulation of income;

—after the decease of younger son, trusts for his wife and children;

—maintenance after death of A. and his wife;

56 *c*[7]. AND I DIRECT, that if, at the decease of the said [*younger son*], or of his surviving wife (if any), any of his children should be under the age of twenty-one years, then an adequate portion of the annual income arising from each such child's presumptive share or respective shares, shall be applied by my said trustees or trustee for the maintenance and education of such child; AND I DIRECT, that the unapplied portion (if any) of such income shall from time to time be added to the capital of the share whence the same shall have arisen, but, nevertheless, the same shall continue liable to be applied, if occasion shall require, to the maintenance

—accumulation;

Accumulation of income.

(*a*) [It is as well to qualify the provision in this way, because it is not clear that a direction to accumulate beyond the period of twenty-one years might not, as to the present objects, come within the saving of the 2nd section of the Thellusson Act, 40 Geo. 3, c. 98, ante, p. 196.]

and education of the child or children for the time being presumptively entitled thereto. AND I ALSO EMPOWER my said trustees or trustee, if it should be deemed expedient, at any time or times after the decease of the said [*younger son*] and of his widow (if any), in the discretion of my said trustees or trustee, or in the lifetime of the said [*younger son*] with his consent in writing, and afterwards in the lifetime of his widow (if any) with her consent in writing, to apply any part, not exceeding one-half of the principal of the presumptive share or shares of any child or children of my said [*younger son*] respectively, for his, her, or their advancement in life, in such manner as my said trustees or trustee, in their or his discretion, shall think proper.

—power of advancement with consent of A. or wife, if living; if not, at discretion of trustees;

56 *c*[8]. AND, in case the said [*younger son*] should have no child who shall acquire a vested interest in the said trust-fund under the trusts aforesaid, then I DIRECT that my said trustees or trustee shall stand possessed thereof, and of the income arising therefrom, after the decease of the said [*younger son*] and of any wife who may happen to survive him as aforesaid, UPON TRUST for my said son, [*elder son*], for his own absolute use and benefit (*a*), [*or*, Upon the trusts and purposes, and with, under, and subject to the powers, authorities, provisoes, and declarations herein expressed and contained of and concerning the fourth part or share of my said residuary estate and the proceeds thereof hereinbefore limited in trust for my said son, [*elder son*], or his children or issue.]

—in default of children of A., for B. absolutely, [*or*, upon trusts by reference];

56 *c*[9]. PROVIDED ALWAYS, AND I HEREBY DIRECT AND DECLARE, that in case, at any future period, circumstances should exist, which, in the opinion of the trustees or trustee for the time being of my will, shall justify or render expedient the placing at the disposal of my said son, [*name*], any portion of the one fourth share in my said residuary estate, the trusts whereof are lastly hereinbefore declared, then it shall be law-

—power to pay moiety of trust-monies to younger son;

(*a*) As trusts, like those declared of the fourth share appropriated to the younger son and his family, are intended to protect him against his own imprudence, it is often proper to accompany such trusts with a power in the trustees to confer on the legatee for life an absolute interest, if his course of conduct, or the circumstances in his situation, which occasioned the imposition of the restrictions, should cease to exist. In such case, the clause (56 *c*[6]) may be added. [See some other provisions against improvidence in the forms (19 *a*), (19 *f*), (19 *l*), (22 *a*), (22 *b*), (22 *c*), (22 *d*), (23 *a*), (37 *b*), (37 *c*), (43 *l*), (43 *m*).]

ful for my said trustees or trustee to transfer absolutely to my said son, for his own proper use and benefit, any portion not exceeding one-half of the trust-fund constituting such one fourth share; and, immediately upon such transfer being made, the trusts hereinbefore declared concerning so much of the said share as shall be so transferred shall absolutely cease and determine.

—as to one other fourth of the residue, upon trust for investment;

56 *c* [10]. And, as to one other equal fourth part or share of the monies produced by or forming part of my said residuary real and personal estate as aforesaid, I direct that my said trustees or trustee shall lay out and invest the same monies in their or his own names, in the public stocks or funds of Great Britain, or on real securities in England or Wales, and not in Ireland, with power from time to time to vary such investments as often as they or he shall think expedient; And shall stand possessed of the said trust-monies, funds, and securities of which the said one-fourth part or share of my said residuary real and personal estate shall consist, In trust, from time to time, to pay the annual produce and income arising therefrom into the proper hands of my said daughter, [*elder daughter*], for and during her life, for her sole and separate use and benefit, free from the control, debts, and engagements of her present or any future husband, and so that she may not have power to alienate, dispose of, engage, or receive the same or any part thereof by way of anticipation. And, from and after the decease of my said daughter, [*elder daughter*],—

for separate and inalienable use of elder daughter for life;

at her decease, for children attaining majority or leaving issue;

56 *c* [11]. In trust for such child or children of her the said [*elder daughter*], as shall survive me and attain the age of twenty-one years or die under that age leaving issue, and such child or children of any child or children of my said daughter dying before me, as shall attain the age of twenty-one years or die under that age leaving issue, and if more than one in equal shares and proportions as between brothers and sisters, for the absolute use and benefit of such child or children, grandchild or grandchildren respectively; But so that the child or the children collectively of any deceased child of my said daughter, shall take only such share as his, her, or their parent would have taken if living (*a*).

(*a*) [Here, the daughter takes no power of selection. See the form where such a power is given to her (43 *a* [7]).]

56 *c* [12]. PROVIDED ALWAYS, AND I HEREBY DIRECT, that my said trustees or trustee for the time being shall, after the decease of my said daughter, and while any child or other issue of my said daughter, who for the time being shall be presumptively entitled to all or any part or share of the said trust-monies, funds, and securities, shall be under the age of twenty-one years (*a*), pay and apply the whole, or such part as they or he my said trustees or trustee for the time being shall think fit, of the annual produce and income of the fund, part, or share to which such child or other issue of my said daughter shall for the time being be presumptively entitled, for or towards the maintenance and education of such child or issue; And that my said trustees or trustee for the time being may, if they or he shall think fit, pay the same for that purpose to the surviving parent or guardian or guardians of such child or issue, [or to any person or persons who, whether duly appointed or authorised or not, shall act as guardian or guardians of such child or issue,] without being bound to see to the application thereof; And shall, during such minority, accumulate all the surplus (if any) of the said annual produce and income in the way of compound interest, by investing the same and all the resulting produce and income thereof, from time to time, in or upon any of the stocks, funds, securities, or investments hereinbefore authorised, and add such accumulations to the principal or capital of the fund or share from which the same shall have arisen; With power, nevertheless, for my said trustees or trustee, at any time or times, to resort to any such accumulations for the maintenance or education of the person or persons for the time being presumptively entitled thereto.

—maintenance of infant children and grandchildren of daughter;

—power to pay maintenance-money to guardians;

—accumulation of surplus income;

56 *c* [13]. PROVIDED ALSO, AND I HEREBY DECLARE, that it shall be lawful for my said trustees or trustee for the time being, at any time or times in the lifetime of my said daughter, [*name*], with her consent in writing, and, after her decease, at the sole discretion of my said trustees or trustee for the time being, to raise any part or parts, not exceeding in the whole one-half, of the fund or share to which any child or other issue of my said daughter shall be presumptively enti-

—advancement;

(*a*) [As the daughter's shares do not vest on marriage, the words "and (being a girl or girls) unmarried," are not proper here. Nor is the insertion of them material in any case.]

tled; And to pay or apply the same for the advancement in the world or benefit of such child or issue, in such manner as my said trustees or trustee shall think fit.

—on failure of daughter's issue, for daughter absolutely;

56 *c* [14]. And in case there should be no child or grandchild of my said daughter, [*name*], who shall survive me and live to attain the age of twenty-one years, or die under that age leaving issue, then I direct that my trustees shall stand possessed of the said one fourth share in the said residuary estate, In trust for her my said daughter, [*name*], for her own absolute use and benefit.

—remaining fourth part for younger daughter and her issue, by reference to limitations of elder daughter's share.

56 *c* [15]. And, as to the other or remaining fourth part or share of my said residuary estate and the produce thereof, I direct and declare that my said trustees or trustee shall stand possessed thereof for the benefit of my said [*younger daughter*] and her children or grandchildren, upon and for trusts and purposes, and with, under, and subject to powers, authorities, and provisions similar to, and in all respects corresponding with, the trusts, purposes, powers, authorities, and provisions herein expressed and contained concerning the one-fourth share of my said residuary estate hereinbefore limited in trust for my said daughter, [*elder daughter*], and her issue, as effectually as if the same trusts, limitations, powers, authorities, and provisoes were here repeated, with the substitution therein of the name of my said daughter, [*younger daughter*], for the name of my said daughter, [*elder daughter*], wherever such name occurs, and upon or for no other trust, intent, or purpose whatsoever.

As to one-fourth of residue;

—one moiety of income of one-fourth to son's widow;

—(subject thereto) the fourth for grandson at twenty-one;

56 *d* [1]. And to stand possessed of one equal fourth part or share of the said trust-monies, funds, and securities, Upon the trusts following (that is to say), Upon trust to pay one moiety or equal half part of the annual produce and income of the said one-fourth share unto [*son's widow*], the widow of my son, [*name*], or to permit or empower her to receive the same during her life; And as to the last-mentioned moiety or equal half part of the said one-fourth share from and after the decease of the said [*son's widow*], and also as to the other or remaining moiety or equal half part thereof from and immediately after my own decease, In trust for [*grandson*], the only child of my said son, [*name*], for his own absolute use and benefit, to be paid and transferred to him on his attaining the age of twenty-one years; And in the meantime, I

AUTHORISE AND EMPOWER my said trustees or trustee to apply the annual produce and income arising from the said share, or such part thereof as my said trustees or trustee shall deem adequate for the purpose, (nevertheless, as to one moiety thereof, subject and without prejudice to the said life-interest of the said [*son's widow*] therein), for the maintenance and education of my said grandson, or, in their or his discretion, to pay the same to my said grandson's mother, the said [*son's widow*], for the purpose of being so applied, (without any responsibility on the part of my said trustees or trustee to see to the application thereof); And the residue or unapplied portion to accumulate at interest in augmentation of the capital, but with power nevertheless to apply the same, if occasion shall require, for such maintenance and education as aforesaid.

—maintenance of grandson;

—power to pay maintenance-money to grandson's mother;

56 *d*[2]. AND I AUTHORISE AND EMPOWER my trustees or trustee (subject and without prejudice as aforesaid) to apply any part of the principal or capital of the said share, not exceeding the sum of £——, in the apprenticing or placing out of the said [*grandson*] to any profession, trade, or business, or otherwise for his advancement in life, as my said trustees or trustee shall think proper.

—advancement;

56 *d*[3]. AND, in case the said [*grandson*] should die under the age of twenty-one years without leaving issue living at his decease, Then I DIRECT AND DECLARE, that his said part or share of and in the said trust-monies, funds, and securities, and the accumulations arising therefrom as aforesaid, shall be subject to the trusts and disposition in and by my said will expressed and made concerning the other or remaining parts or shares of the same trust-monies, funds, and securities.

56 *e*[1]. UPON TRUST, in the first place, by and out of the annual produce and income of the said trust-monies, funds, and securities, [and the gains and profits of the said business and concerns,] to pay to my said wife, [*name*], and her assigns, for and during her life, an annuity or clear yearly sum of £——, by equal quarterly portions, on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, in every year; the first payment thereof to be made in full on such of the said quarterly days of payment as shall next happen after my decease, (from the quarter day preceding which event the said annuity is to commence), and also a proportional sum for the fractional

(*Residue and profits of coal works*).

Annuity of £—— to his wife for her life, payable quarterly;

period, if any, of the quarter which shall or may be pending or current at the time of the decease of the said [*wife*], to be paid immediately on such decease (*a*).

—a residue of income,

56 *e* [2]. And, upon trust to pay the residue or surplus of the said annual produce and income, [gains and profits,] during the continuance of the said annuity, and the whole of such annual produce and income, [gains and profits,] after the determination thereof, unto my said son, [*name*], and my said three daughters, [*names*], and their several assigns, during the respective lives of my said son and three daughters, in equal shares and proportions; And from and after the respective deceases of my said son and daughters, then, [as to my said residuary personal estate and effects, and the gains, profits, and capital of my said coal and iron works and concerns, and the monies to arise therefrom respectively, and] the said stocks, funds, and securities [in or upon which the same shall be invested as aforesaid,]—

for son and three daughters for their lives equally;

—capital for the children of the son and daughters equally, per stirpes;

56 *e* [3]. In trust for such child or children of my said son and three daughters, respectively, as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or shall marry, which shall first happen, in equal shares if more than one; But such children of my said children to take, not per capita but per stirpes, the shares or share in the several last-mentioned trust-premises, to the annual produce and income whereof his, her, or their deceased parent or parents respectively were, or if living would have been, entitled during his, her, or their life or respective lives.

—accruer among the respective stocks;

56 *e* [4]. And if any one or more of my said son and three daughters shall die without having a child, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then the part or share, or parts or shares, as well original as accruing by virtue of this present clause, of or in the said trust-monies, funds, securities, and premises, which would have belonged to the child or children of such one or more of my said son and three daughters who

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(*a*) According to the view taken, ante, Vol. 2, p. 606, of the Apportionment Act (4 & 5 Will. 4, c. 22), (in which the Editor is glad to find that he does not stand alone), vide Hayes' Introduction to Conveyancing, Vol. 1, 5th ed. p. 338, that act would not apply to the present annuity.

shall so die without having any such child, in case there had been such child or children, [*or, better*, the part or share which shall, by reason thereof, fail to be effectually disposed of under the limitations and trusts aforesaid,] shall be IN TRUST for the others or other of my said son and three daughters, and such child or children of them, him, or her respectively, as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, which shall first happen, for such and the same respective interests, and in such and the same shares, proportions, and manner in all respects, as are hereinbefore limited, expressed, and declared of and concerning the original shares or share of such others or other of my said son and daughters and their respective child or children, of and in the said trust-monies, funds, and securities, and premises (*a*). AND if there —in case of a

(*a*) [The form in the text is framed on a vicious principle. It is, however, in its present state, considerably shorter and clearer than the form from which it has been reduced, and which is given below as a specimen of a style of drawing not yet obsolete. By comparing this form with the forms (*55 a*) and (*58 d*), the student will gain some notion of the variety of style which is at the command and option of the draughtsman.]

Clause of accruer among the respective stocks.

"AND if any one or more of my said son and three daughters shall die without having a child, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then as to the part or share, parts or shares, as well original as accruing by virtue of this present clause, which would have belonged to the child or children of such one or more of my said son and three daughters, of whose body there shall be such failure of issue as aforesaid, in case there had not been such failure of issue, of or in the last-mentioned monies and premises, the same to be IN TRUST for the survivors or survivor or others or other of my said son and three daughters, and of such of the respective children of the same son and daughters, as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, which shall first happen, for such and the same interests, and in such and the same manner in all respects as my last-mentioned son and daughters, and such issue of the same son and daughters as aforesaid, or any of them respectively, as may happen to be severally entitled to

total failure of the objects of preceding trusts;

should be no child of any of my said children, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then my will is,—

—to raise £—— for each child of testator's brother then living;

56 *e*[5]. And I hereby direct, that my said trustees or trustee shall, in case there should be any child or children of my brother, [*name*], living at the time of the decease of the survivor of all them my said children, levy and raise, by and out of the last-mentioned trust-monies, funds, securities, and premises, (but subject and without prejudice to the said life annuity of £——, if the same should be then subsisting), the sum of £—— a-piece for each and every of the children of the said [*brother*], who shall be so living at the time of such decease, and pay the same sum to each such child, for his, her, or their own benefit respectively; And, subject thereto, and as to the residue of [my said personal estate and effects, and the gains, profits, and capital of my said coal and iron works and concerns, and the monies to arise therefrom respectively, and] the said stocks, funds, and securities [in or upon which all such monies shall be laid out and invested, and every of the said premises,] from and after the respective deceases of my said son and three daughters without having any such child as aforesaid (but subject as aforesaid), In trust for my bro-

—and, as to the residue, for testator's brother absolutely;

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original shares or an original share in the said residuary personal estate, works, and concerns, and other last-mentioned premises under the trusts lastly hereinbefore declared; and if all my said four children, save one, shall die without any child of their respective bodies, who, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or marry, then as to the whole of the said residuary personal estate, works, and concerns, and the other last-mentioned premises, the same to be In trust for my remaining child, and such child or children of his or her body, as, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, for such and the same interests and in such and the same manner as my last-mentioned child, and such his or her issue as aforesaid, and every of them, will be or in any case would have been respectively entitled to an original share of my said residuary personal estate, works, concerns, and other last-mentioned premises under the trusts of this my will."

ther, [*name*], his executors, administrators, and assigns, for his and their absolute benefit.

56 *e*[6]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that in case at my decease my said son, [*name*], should be under the age of twenty-one years, or any or all of my said daughters should be under that age and unmarried, or in case at any time after my decease and the decease or respective deceases of any of my said four children, or one or more of his, her, or their respective children, being a son or sons, should be under the age of twenty-one years, or, being a daughter or daughters, should be under that age and unmarried, then the trustees or trustee for the time being of my will shall, during every such minority or minority and discoverture (as the case may be), pay and apply the annual produce and income hereinbefore given in trust for each such child respectively, or (as the case may be), the annual produce and income arising from the expectant or presumptive part or share of each such grandchild respectively, of or in the last-mentioned trust-monies, funds, securities, and premises, or so much thereof as my said trustees or trustee shall think proper, in or towards the maintenance and education of such child or grandchild during his or her minority or minority and discoverture (as the case may be), And shall accumulate and improve the residue or surplus (if any), of the said annual produce and income, by investing the same and the produce thereof from time to time in the names or name of my said trustees or trustee for the time being, in the public stocks or funds of Great Britain, or at interest upon real security in England or Wales, to be from time to time altered and varied as occasion shall require; And such accumulations respectively as shall arise from the income of any such child of mine to belong to such child, and be disposed of as arrears of his or her income; and such accumulations respectively as shall arise from the share of any grandchild of mine after the decease of his or her parent to be added to and follow the destination of the principal or capital of such share; but all such accumulations respectively, nevertheless, to remain applicable, in the discretion of my said trustees or trustee, to the maintenance and education of the person or persons for the time being actually or presumptively entitled thereto. AND I DECLARE, that, in the performance of the power or trust lastly hereinbefore contained, it shall not be incumbent on my said trustees or trustee to inquire whether

—maintenance and education of children (*legatees for life*) and grandchildren;

—accumulation.

the object or objects thereof is or are entitled to maintenance out of any other fund or from any other person.

56*f*[1]. And as to, for, and concerning all the residue and surplus of the aforesaid trust monies which shall remain after the several deductions, appropriations, and payments hereinbefore mentioned, and all other the said personal estate and effects, I direct, that the said trustees or trustee for the time being of my will shall pay, assign and transfer one equal moiety or half part thereof unto my said son, [*eldest son*], for his own use and benefit absolutely.

One moiety of residue to eldest son absolutely;

56*f*[2]. And in case my said son, [*name*], should happen to die in my lifetime, then I direct that the said moiety or equal half part of the said trust-monies shall be retained and held by the said trustees or trustee for the time being of my will, Upon trust to lay out and invest the same in their or his names or name, in the public stocks or funds of Great Britain, or on mortgage of freehold, copyhold, or leasehold estates in England or Wales, and not in Ireland, the leaseholds being held for an absolute term whereof not less than forty years shall be then unexpired, With power from time to time as they or he shall think fit to vary and change such investments; And to stand possessed thereof—

—if son die before testator, for his wife and children by reference to trusts of a legacy;

56*f*[3]. Upon trust to pay the annual produce and income for the time being arising therefrom unto [*name*], the wife of my said son, [*name*], during her life, for her own use; and after her decease, Upon trust to transfer and pay the principal unto, between, or amongst the child or children of my said son, [*name*], equally if more than one, to be payable at the same or the like ages, days, and times, and to be under and subject to the same or the like powers, restrictions, and limitations, and with the same or the like benefit of survivorship and accruer, and in the same or the like manner in all respects as are herein expressed and declared concerning the respective moieties of the said £——Consolidated Three Pounds per Centum Annuities, hereby bequeathed to or in trust for the children of my said sons, [*second son*] and [*third son*], respectively (*a*).

—as to other moiety of residue,

56*f*[4]. And as to, for, and concerning the other or remaining moiety or half part of the last-mentioned residue and

(*a*) [See the form (43 *l*).]

surplus of the said trust-monies, to arise and be produced as aforesaid, and of all other the said personal estate and effects, I DIRECT AND DECLARE, that my said trustees or trustee for the time being shall lay out and invest the same in their or his own names or name in the public stocks or funds of Great Britain, or on such mortgage securities as aforesaid, and with power, from time to time, as they or he shall see fit, to vary and change such investments, and shall stand and be possessed of the same trust-monies, funds, and securities, and of the annual produce and income thereof—

for separate and inalienable use of testator's daughter for life, and then

56*f*[5]. UPON TRUST to pay the annual produce and income for the time being arising therefrom into the proper hands of my said daughter, [*name*], wife of [*husband*], of ——, for and during her life, so that the same may be for her sole and separate use and benefit, free from the control, debts, and engagements of her said husband or of any future husband, and so that she may not have power to alienate, dispose of, engage, or receive the same by way of anticipation; And from and after the decease of my said daughter, [*name*], then—

for husband of daughter for life, and after his death,

56*f*[6]. UPON TRUST to pay the annual produce and income for the time being arising from the last-mentioned trust-monies, funds, and securities, unto the said [*husband of daughter*], during his life, for his own use and benefit; And from and after the decease of the survivor of them my said daughter and her said husband, then (*Trusts for daughter's children* (56 *c*[11]), *or as follows*):

to transfer the capital to the children of daughter;

56*f*[7]. UPON TRUST to transfer and pay the said last-mentioned trust-monies, funds, and securities, and the annual produce and income thereof, unto, between, or amongst the child or children of my said daughter, [*name*], in manner hereinafter mentioned.

—direction as to the class of children to be entitled, and

56*f*[8]. AND I HEREBY DIRECT, that the trusts for or for the benefit of the children of the said [*second and third sons*] (*a*), and [*daughter*], respectively, hereinbefore contained, shall ex-

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(*a*) [In the form (43 *l*), ante, p. 548, containing the limitations of the legacies for the benefit of the testator's younger sons, the trusts for the children are made complete in themselves, which is the better way. The original form (with respect to the shares of the daughters) is here given as an example of a mode of drawing, which may, perhaps, be convenient in some cases. It is, however, remarkable, that, in the old school of conveyancing, devices having brevity for their ostensible object, have generally been more prolix than the ordinary forms for which they have been substituted.]

the time of transferring children's shares;

tend to and comprise the children of any past, present,[1] or future marriage, and whether such children respectively shall happen to be born before or after the determination of the trust or trusts precedent or prior to the trust or trusts in favour of such child or children respectively (*a*); And that the share of each child who shall be a male shall be payable to him respectively when and as he respectively shall attain his age of twenty-one years; and the share of each of the same children respectively who shall be a female shall be payable to her respectively when and as she respectively shall attain her age of twenty-one years, or on her day of marriage, whichever, as to each of them respectively, shall first happen; Nevertheless, in case any of such male children should attain the said age, or any of such female children should attain the said age or marry, before the death of the survivor of their said parents, then their respective shares shall be paid and transferred to them as soon as conveniently may be after the death of such survivor respectively.

As to gifts to children.

(*a*) Although a gift to the children generally of a living person will extend to children by a deceased or future husband or wife, yet where the existing husband or wife takes a life-interest in the fund, which is ultimately given to the children, it is better to express the intention to let in the issue of a former or future marriage; as the general frame of the trusts, or some expressions in them, may possibly give rise to a plausible argument for restricting the gift to the children whose parents take life-interests under the trusts. Vide ante, p. 312.

As to deferred gifts to children where the prior life-interest may determine in the parents' lifetime.

Where property is given to children in expectancy on an absolute life-interest of their parents, or either of them, it is superfluous to introduce any express designation of the class of children to be entitled in reference to the period of birth, since the ordinary rule of construction, which lets in all the children coming in esse before the period of distribution (ante, p. 318), necessarily includes the whole line of children, as every child must come in esse in the lifetime of his parent; but where (as in the case of the legacies for the benefit of the testator's sons, to which the provision in the text relates) the parent's life-interest is made determinable on a collateral event, it is proper to prevent, by expressly negativing, the exclusion of children who may happen to be born in the lifetime of the parent subsequently to the determination of the interest of such parent. [But it may well be doubted, whether the mere forfeiture, under a provision in the will, of the parent's life-interest would be allowed to exclude after-born children. The cases in which it has been held (by a single judge) that a married woman's reversionary choses en action may be reduced into possession by means of a release of the prior interests, (*Hall* v. *Hugonin*, 14 Sim. 955, &c.) may be thought to afford an analogous instance; but there is every reason to expect that those cases will not be followed.]

56 *f*[9]. And in case any one or more of the children of the said [*second and third sons*], and [*daughter*], respectively, being a male or males, should depart this life under the age of twenty-one years without leaving any issue living at his or their death or respective deaths, or, being a female or females, should depart this life under the age of twenty-one years and without having been married, then the part or share of every child so dying (including as well any surviving or accruing share or shares as the original share or shares) of and in as well the two said several sums of £—— and £—— Consolidated Three Pounds per Centum Annuities, as the last-mentioned trust-monies, funds, and securities respectively, shall be held upon the same or the like trusts for the benefit of the other or others of the children who shall so die of them the said [*second and third sons*], and [*daughter*], in the same or the like manner, to all intents and purposes, as if the child or children so dying had never been born. And in case any one or more of them the said [*second and third sons*], and [*daughter*], should die without having any child who shall survive me, and, being a male, attain the age of twenty-one years, or die under that age leaving issue living at his death, or, being a female, attain that age or marry, then the share and interest or respective shares and interests of the child or children respectively so dying shall go and belong to the person or persons who would, at such the decease of any or either of my said sons and daughter so dying as aforesaid, or the decease and failure of his, her, or their child or children, which shall last happen (*a*), be entitled as next of kin or

—survivorship and accruer as to the shares of grandsons dying under twenty-one without leaving issue, and granddaughters dying under twenty-one and unmarried;

—gift over of the shares of any of the testator's sons and daughters dying without children.

(*a*) In framing a trust for next of kin, to take effect on the failure of the objects of a prior trust, or on any other event which may not happen until after the decease of the person whose next of kin are the objects of the trust, it is of importance explicitly to shew whether the gift is intended to comprehend the persons answering the description of next of kin at the death of the testator, or of other the person whose next of kin are the objects of the trust, or those to whom it applies at the posterior period, when the gift takes effect in possession. The cases on this subject are numerous, and in a few instances conflicting. (Vide ante, p. 357; and *Briden* v. *Hewlett*, 2 Myl. & Kee. 90). The general principles of construction would seem to require, that the gift should be held to embrace next of kin at the earlier period (i. e. the death), unless the contrary can be collected from the terms of the will, and such perhaps may be stated to be the doctrine on the subject; but the grounds upon which this construction has been departed from (the testator being considered to mean next of kin when the gift takes effect in possession)

Remarks upon gifts to next of kin.

otherwise to my personal estate under the statutes made for the distribution of the estates and effects of intestates, and in the same proportions and manner as they would be entitled by virtue of such statutes if I had then died intestate.

Trust to pay annuity to widow for life;

56 *g* [1]. Upon trust, out of the annual produce and income of the said trust-monies, funds, and securities, to pay to my said wife an annuity or yearly sum of £—— during her life, by equal quarterly payments of £—— each, on every 5th day of January, 5th day of April, 5th day of July, and 10th day of October, during the life of my said wife, the first quarterly payment thereof to be made in full on such of the said days as shall happen next after my decease, if she should be then living. And in case my said wife should survive me, and die on any day not being one of the said days of quarterly payment, then to pay to her executors or administrators a part of the said annuity of £——, proportional to the time which shall have elapsed from the last quarter-day (or, if no such day should have arrived, from the day of my decease) up to the day of her decease; And, subject to the payment of the said annuity and proportional part,—

—then as to one moiety for married daughter

56 *g* [2]. Upon trust, as to one equal moiety of the said trust-monies, funds, and securities, to pay the annual produce

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have been often so slight, that great caution is to be exercised in applying such an hypothesis.

The term "next of kin," however, it is conceived, would not be diverted from its ordinary construction, by the fact that such construction would carry the gift to the same persons as had been temporarily presumptive objects of the prior trust, but who did not live to acquire the complete qualification which the testator had annexed to the gift, though in all probability the testator's intention is by this means defeated. For instance, suppose a gift to A. for life, and after her decease, to her children attaining twenty-one years, and in default of such children, to her next of kin: if A. dies, leaving a child who afterwards dies under twenty-one years, such child, though not entitled to take under the trust in favour of children, would come in under the trust in favour of next of kin, unless such trust could be applied to next of kin at the time of the decease of the child of A., which would seem not to be admissible. It is obvious, therefore, that the intention of testators is generally best answered by making the trusts in question apply to next of kin when the gift takes effect in possession, rather than to next of kin at the death; but clearness on the point is an advantage of higher value than the comparative eligibility of either of the respective modes of framing the gift.

and income thereof unto my elder daughter, [*name*], for and during her life, so that the same may be for her sole and separate use and benefit, and free from the control, debts, and engagements of her said present or any future husband; And after the decease of my said daughter, [*name*],— and her husband successively for life;

56 *g* [3]. Upon trust to pay the said annual produce and income unto any surviving husband of my said daughter, [*name*], for and during his life; And, after the decease of my said daughter, and of her surviving husband (if any), then as to the said moiety of the said trust-monies, funds, and securities, and the annual produce and income of the same,—

56 *g* [4]. In trust for such child or children or other issue of my said daughter, [*name*], to be born or in being during her life, at such age or time, or respective ages or times, and if more than one, in such shares and proportions, and with such future or executory or other trusts for the benefit of the said issue or some or one of them, and with such provisions for their respective maintenance, education, or advancement, at the discretion of my trustees or trustee for the time being, or of any other person or persons, and upon such conditions, with such restrictions, and in such manner as my said daughter, [*name*], shall, by any deed or deeds, attested by one witness or more, with or without power of revocation and new appointment, or by her last will and testament or any testamentary writing, at any time or times, and notwithstanding any coverture, direct or appoint. And in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend,— —then for surviving issue of daughter, as she shall appoint.

56 *g* [5]. In trust for such children or child of my said daughter, [*name*], already born or to be born, as shall be living at the decease of the survivor of my said daughter, [*name*], and her said husband, and shall attain the age of twenty-one years, and such child or children of any child or children of my said daughter dying in the lifetime of my said daughter or of her said husband (*a*), or under the age of twenty-one years, as shall be living at the decease of the survivor of them my said daughter and her said husband, and if more than one, in equal shares and proportions as between or among brothers and sis- —for children of elder daughter surviving her and her husband at twenty-one, and surviving children of deceased children;

(*a*) [Not *any* surviving husband, because that would be too remote, as in the eye of the law there is a possibility that the daughter may marry a person not born until after the testator's death.]

ters, but so that the child or the children collectively of any deceased child of my said daughter shall take only the share which his, her, or their parent would have taken if living.

—hotchpot;

56 *g*[6]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that no child or grandchild of my said daughter who or whose issue shall take any part of or interest in the said moiety of the trust-monies, funds, and securities under or by virtue of any direction or appointment in pursuance of the power hereinbefore contained, shall have or be entitled to any further or other share of or in that part of or interest in the said moiety of the said trust-monies, funds, and securities of which no such direction or appointment shall have been made, without bringing the share or shares and interest or interests appointed to him or her, or his or her issue, into equal distribution with the unappointed part of or interest in the said moiety of the said trust-monies, funds, and securities, or allowing for the same.

—on failure of such issue, as to one half of the moiety,

56 *g*[7]. AND, subject to the trusts hereinbefore contained, and to any appointment hereinbefore authorised, and in case there should be no child or children or other issue of my said daughter, [*name*], who shall live to take a vested and absolute interest or vested and absolute interests in the whole of the said moiety of the said trust-monies, funds, and securities, under the trusts, powers, or authorities hereinbefore contained, then—

for testator's son if he survive daughter and her surviving husband;

56 *g*[8]. UPON TRUST, as to one equal half part of the beforementioned moiety (being one equal fourth part of the entirety) of the said trust-monies, funds, and securities, and of the annual produce and income thereof, or of so much and such parts of the said moiety and of the income thereof respectively as shall not be effectually appointed as aforesaid, to pay and transfer the same unto my son, [*name*], his executors, administrators, and assigns, in case he should be living at the decease of my said daughter, [*name*], and of her surviving husband (if any), and also at the time when such failure of issue of my said daughter [*elder daughter*] to take as aforesaid shall be ascertained. AND in case my said son, [*name*], should not be living at the happening of both such last-mentioned events, then, from and after the happening of such of the said events as shall last happen,—

—if son then living,

—if son not then living, for his widow for life, and then

56 *g*[9]. UPON TRUST to pay the annual produce and income of the said fourth part of the said trust-monies, funds, and securities unto the widow of my said son (if any) during her

life; And after the decease of my said son, and of his widow (if any), then as to the same fourth part of the said trust-monies, funds, and securities, and the annual produce and income thereof,—

for his surviving issue, as he shall appoint;

56 *g*[10]. In trust for such child or children or other issue of my said son, [*name*], living at the decease of the survivor of my said daughter, [*elder daughter*], and her said husband, or at the time when such failure of issue of my said daughter [*elder daughter*] to take as aforesaid shall be ascertained, (whichever shall last happen), at such age or time, or respective ages or times, and if more than one in such shares and proportions, and with such future or executory or other trusts for the benefit of the said issue or some or one of them, and with such provisions for their respective maintenance, education, or advancement, at the discretion of my said trustees or trustee for the time being, or of any other person or persons, and upon such conditions and with such restrictions and in such manner as my said son, [*name*], shall by any deed or deeds attested by one witness or more, with or without power of revocation and new appointment, or by his last will and testament or any testamentary writing, from time to time and at any time or times direct or appoint; And in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend,—

—if no appointment, for surviving children or grandchildren of son, per stirpes;

56 *g*[11]. In trust for such child or children of my said son, [*name*], as shall be living at the decease of the survivor of my said daughter, [*name*], and her said husband, and also at the time when such failure of issue of my said daughter to take as aforesaid shall be ascertained, and shall attain the age of twenty-one years, and such child or children of any child or children of my said son, [*name*], dying in the lifetime of my said daughter, [*elder daughter*], or of her said husband, or before such failure of issue of my said daughter as aforesaid shall be ascertained, or under the age of twenty-one years, as shall be living at the decease of the survivor of my said daughter and her said husband, or at the time when such failure of issue of my said daughter to take as aforesaid shall be ascertained (whichever shall last happen), and if more than one in equal shares and proportions as between or among brothers and sisters, but so that the child or the children collectively of any deceased child of my said son shall take only the share which his, her, or their parent would have taken if living.

—hotchpot;

56 *g*[12]. PROVIDED ALWAYS, and I hereby declare, that no child or grandchild of my said son, who or whose issue shall take any part of or interest in the last-mentioned fourth part of the said trust-monies, funds, and securities, under or by virtue of any direction and appointment in pursuance of the power lastly hereinbefore contained, shall have or be entitled to any further or other share of or in that part of or interest in the same fourth part of the said trust-monies, funds, and securities, of which no such direction or appointment shall have been made, without bringing the share or shares and interest or interests appointed to him or her or his or her issue into equal distribution with the unappointed part of or interest in the same fourth part of the said trust-monies, funds, and securities, or allowing for the same.

—on failure of the above trusts, upon the trusts of the other half of the moiety;

56 *g*[13]. AND subject to the trusts hereinbefore contained, and to any appointment hereinbefore authorised, and in case my said son, [*name*], should not be living at the decease of my said daughter, [*elder daughter*], and of her surviving husband, if any, and also at the time when such failure of issue of my said daughter [*elder daughter*] to take under the trusts aforesaid shall be ascertained, and there should be no child or children or other issue of my said son, [*name*], who shall live to take a vested and absolute interest or vested and absolute interests in the whole of the said fourth part of the said trust-monies, funds, and securities, or the unappointed part thereof and interest therein, then UPON THE TRUSTS, and for the ends, intents, and purposes, and with and subject to the powers and authorities hereinafter declared concerning the remaining or other half part of the before-mentioned moiety of the said trust-monies, funds, and securities, being another fourth part of the entirety of the said trust-monies, funds, and securities.

—as to the other half of the moiety, for younger daughter for her separate use for life;

—then for her surviving husband;

56 *g*[14]. AND, as to such last-mentioned fourth part of the said trust-monies, funds, and securities, and the annual produce and income thereof, UPON TRUST to pay the annual produce and income of the same fourth part unto my younger daughter, [*younger daughter*], during her life, for her sole and separate use, free from the control, debts, and engagements of any husband. AND after the decease of my said daughter, [*younger daughter*], UPON TRUST to pay the said interest, dividends, and annual income unto any surviving husband of my said daughter, [*younger daughter*], during his life.

And after the decease of my said daughter, [*younger daughter*], and of her surviving husband (if any), then, as to, for, and concerning such last-mentioned fourth part of the said trust-monies, funds, and securities, and the annual produce and income thereof,—

—then for her surviving issue, as she shall appoint;

56 *g*[15]. In trust for such child or children or other issue of my said daughter, [*younger daughter*], living at the decease of the survivor of the said [*elder daughter, husband, and younger daughter*], or at the time when such failure of issue of my said daughter, [*elder daughter*], to take as aforesaid shall be ascertained (whichever shall last happen), at such age or time or respective ages or times, and if more than one in such shares and proportions, and with such future or executory or other trusts for the benefit of the said issue, or some or one of them, and with such provisions for their respective maintenance, education, or advancement, at the discretion of my said trustees or trustee for the time being, or of any other person or persons, and upon such conditions, with such restrictions, and in such manner, as my said daughter, [*younger daughter*], shall by any deed or deeds, attested by one witness or more, with or without power of revocation and new appointment, or by her last will and testament or any testamentary writing, from time to time, and at any time or times, and notwithstanding any coverture, direct or appoint. And in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend,—

—in default of appointment, for her surviving children or grandchildren;

56 *g*[16]. In trust for such child or children of my said daughter, [*younger daughter*], as shall be living at the decease of the survivor of the said [*elder daughter, husband, and younger daughter*], and also at the time when such failure of issue of my said daughter, [*elder daughter*], to take under the trusts aforesaid shall be ascertained, and shall attain the age of twenty-one years, and such child or children of any child or children of my said daughter, [*younger daughter*], dying in the lifetime of my said daughter, [*elder daughter*], or of her said husband, or of my said daughter, [*younger daughter*], or before such failure of issue of my said daughter, [*elder daughter*], as aforesaid shall be ascertained, or under the age of twenty-one years, as shall be living at the decease of the survivor of the said [*elder daughter, husband, and younger daughter*], or at the time when such failure of issue of my said daughter, [*elder daughter*], as aforesaid shall be ascertained

(whichever shall last happen), and if more than one in equal shares and proportions as between or among brothers and sisters, but so that the child or children of any deceased child of my said daughter, [*younger daughter*], shall take only the share which his, her, or their parent would have taken if living.

—hotchpot;

56 *g* [17]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that no child or grandchild of my said daughter, [*younger daughter*], who or whose issue shall take any part of or interest in the last-mentioned fourth part of the said trust-monies, funds, and securities, under or by virtue of any direction or appointment in pursuance of the power lastly hereinbefore contained, shall have or be entitled to any further or other share of or in that part of or interest in the same fourth part of the said trust-monies, funds, and securities, of which no such direction or appointment shall have been made, without bringing the share or shares and interest or interests appointed to him or her or his or her issue, into equal distribution with the unappointed part of or interest in the said trust-monies, funds, and securities, or allowing for the same.

—on failure of the above trusts, upon the trusts of the first-mentioned half of the moiety;

56 *g* [18]. AND, subject to the trusts hereinbefore contained, and to any appointment hereinbefore authorised, and in case there should be no child or children or other issue of my said daughter, [*younger daughter*], who shall live to take an absolute and vested interest or absolute and vested interests in the whole of the last-mentioned fourth part of the said trust-monies, funds, and securities, or the unappointed part thereof and interest therein, then UPON THE TRUSTS, and for the ends, intents, and purposes, and with and subject to the powers and authorities hereinbefore declared concerning the first-mentioned fourth part of the said trust-monies, funds, and securities.

—and on failure of all the foregoing trusts, as elder daughter shall appoint; and in default of appointment, for her absolutely;

56 *g* [19]. AND IN CASE there should be no person or persons who shall live to take a vested and absolute interest or vested and absolute interests in the whole of the before-mentioned moiety of the said trust-monies, funds, and securities, under or by virtue of the trusts, powers, or authorities hereinbefore contained, then (subject to the trusts, powers, and authorities hereinbefore contained, and as to all or so much and such parts of and interests in the said trust-monies, funds, and securities, premises, and the annual produce and income thereof, as shall not be effectually vested, applied, or disposed of under or by virtue of the said trusts, powers, and authorities), UPON SUCH TRUSTS, and for such ends, intents, and purposes as my said

daughter, [*elder daughter*], shall at any time or times [while sole] by any revocable or irrevocable deed or deeds, attested by one witness or more, or [whether sole or covert] by her last will and testament or any testamentary writing, direct or appoint; AND in default of and subject to any such direction or appointment, IN TRUST for my said daughter, [*elder daughter*], her executors, administrators, and assigns.

56 *g* [20]. AND as to the other or remaining moiety of the said trust-monies, funds, and securities (subject always to the said annuity and proportional part hereinbefore directed to be paid to my said wife), UPON TRUST to pay the annual produce and income thereof unto my said daughter, [*younger daughter*], during her life, so that the same may be for her sole and separate use and benefit, free from the control, debts, and engagements of any husband; AND after the decease of my said daughter, [*younger daughter*], UPON TRUST to pay the said annual produce and income unto any surviving husband of my said daughter, [*younger daughter*], during his life; AND after the decease of my said daughter, [*younger daughter*], and of her surviving husband (if any), then as to the last-mentioned moiety of the said trust-monies, funds, and securities, and the annual produce and income of the same, IN TRUST for such child or children or other issue of my said daughter, [*younger daughter*], to be born or in being during her life, at such age or time or respective ages or times, and if more than one in such shares and proportions, and with such future or executory or other trusts for the benefit of the said issue or some or one of them, and with such provisions for their respective maintenance, education, or advancement, at the discretion of my said trustees or trustee for the time being, or of any other person or persons, and upon such conditions, with such restrictions, and in such manner and form as my said daughter, [*younger daughter*], shall, by any deed or deeds, attested by one witness or more, with or without power of revocation and new appointment, or by her last will and testament or any testamentary writing, from time to time and at any time or times, and notwithstanding any coverture, direct or appoint; AND in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend—

—as to the other moiety, for younger daughter for life;

—then for her surviving husband;

—then for her issue, as she shall appoint;

56 *g* [21]. IN TRUST for such children or child of my said daughter, [*younger daughter*], as shall be living at her de-

—in default of appointment, for her surviv-

ing children or grandchildren

cease and shall attain the age of twenty-one years, and such child or children of any child or children of my said daughter dying in her lifetime or under the age of twenty-one years, as shall be living at her decease, and if more than one in equal shares and proportions as between or among brothers and sisters, but so that the child or the children collectively of any deceased child of my said daughter shall take only the share which his, her, or their parent would have taken if living.

—hotchpot;

56 *g* [22]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that no child or grandchild of my said daughter, [*younger daughter*], who or whose issue shall take any part of or interest in the last-mentioned moiety of the said trust-monies, funds, and securities, by virtue of any direction or appointment in pursuance of the power hereinbefore contained, shall have or be entitled to any further or other share of or in that part of or interest in the said moiety of the said trust-monies, funds, and securities, of which no such direction or appointment shall have been made, without bringing the share or shares and interest or interests appointed to him or her, or his or her issue, into equal distribution with the said unappointed part of or interest in the said moiety of the said trust-monies, funds, and securities, or allowing for the same.

—if no such issue of daughter,

56 *g* [23]. AND, subject to the trusts hereinbefore contained, and to any appointment hereinbefore authorised, and in case there should be no child or children or other issue of my said daughter, [*younger daughter*], who shall live to take a vested and absolute interest or vested and absolute interests in the whole of the said trust-monies, funds, and securities under the trusts, powers, or authorities hereinbefore contained, then—

as to one-half of such moiety, for testator's son if living;

56 *g* [24]. UPON TRUST, as to one equal half part of the last-mentioned moiety (being one equal fourth part of the entirety) of the said trust-monies, funds, and securities, and of the annual produce and income thereof, or of so much and such parts of the said moiety and of the income thereof respectively as shall not be effectually appointed as aforesaid, to pay and transfer the same unto my said son, [*name*], his executors, administrators, or assigns, in case he should be living at the decease of my said daughter and of her surviving husband (if any), and also at the time when such failure of issue of my said daughter, [*younger daughter*], as aforesaid,

shall be ascertained. And in case my said son, [*name*], should not be living at the happening of both such last-mentioned events, then, from and after the happening of such of the said events as shall last happen, Upon trust to pay the annual produce and income of the last-mentioned fourth part of the said trust-monies, funds, and securities, unto the widow of my said son (if any) during her life. And after the decease of my said son and of his widow (if any), then as to the same fourth part of the said trust-monies, funds, and securities, and the annual produce and income thereof,— —if not, for his widow for life;

56*g*[25]. In trust for such child or children or other issue of my said son, [*name*], living at the decease of my said daughter, [*younger daughter*], or at the time when such failure of issue of my said daughter, [*younger daughter*], to take as aforesaid shall be ascertained, (whichever shall last happen), at such age or time or respective ages or times, and if more than one in such shares and proportions, and with such future or executory or other trusts for the benefit of the said issue or some or one of them, and with such provisions for their respective maintenance, education, or advancement, at the discretion of my said trustees or trustee for the time being, or of any other person or persons, and upon such conditions and with such restrictions and in such manner as my said son, [*name*], shall, by any deed or deeds attested by one witness or more with or without power of revocation and new appointment, or by his last will and testament or any testamentary writing, from time to time and at any time or times, direct or appoint. And in default of such direction or appointment, and so far as any such direction or appointment, if incomplete, shall not extend,— —then for his surviving issue, as he shall appoint;

56*g*[26]. In trust for such child or children of my said son, [*name*], as shall be living at the decease of my said daughter, [*younger daughter*], and also at the time when such failure of issue of my said daughter to take as aforesaid shall be ascertained, and shall attain the age of twenty-one years, and such child or children of any child or children of my said son, [*name*], dying in the lifetime of my said daughter, [*younger daughter*], or before such failure of issue of my said daughter as aforesaid shall be ascertained, or under the age of twenty-one years, as shall be living at the decease of my said daughter, or at the time when such failure of issue of my said daughter to take as aforesaid shall be ascertained (whichever shall last happen), and if more than one in equal shares and —in default of appointment, for his surviving children or grandchildren;

proportions as between or among brothers and sisters, but so that the child or the children collectively of any deceased child of my said son shall take only the share which his, her, or their parent would have taken if living. (*Hotchpot clause*, 56 *g* [12].)

—on failure of the above trusts, upon the trusts of the second half of the same moiety;

56 *g* [27]. And subject to the trusts hereinbefore contained and to any appointment hereinbefore authorised, and in case my said son, [*name*], should not be living at the decease of my said daughter, [*younger daughter*], and of her surviving husband (if any), and also at the time when such failure of issue of my said daughter, [*younger daughter*], to take under the trusts aforesaid shall be ascertained, and there should be no child or children or other issue of my said son who shall live to take a vested and absolute interest or vested and absolute interests in the whole of the said fourth part of the said trust-monies, funds, and securities, or the unappointed part thereof and interest therein, then Upon the trusts, and for the ends, intents and purposes, and with, under, and subject to the powers and authorities hereinafter declared concerning the remaining or other half part of the last-mentioned moiety of the said trust-monies, funds, and securities (being another fourth part of the entirety of the same trust-monies, funds, and securities). (*Trust of last-mentioned fourth part, Upon trust for elder daughter and surviving husband successively for life* (56 *g* [14]), *and then issue of elder daughter* (56 *g* [15]), (56 *g* [16]), (56 *g* [17]), *substituting elder daughter for younger daughter, and vice versâ*).

—trusts of second half of moiety;

—on failure of above trusts, upon the trusts of the first-mentioned half of the same moiety;

56 *g* [28]. And subject to the trusts hereinbefore contained, and to any appointment hereinbefore authorised, and in case there should be no child or children or other issue of my said daughter, [*elder daughter*], who shall live to take an absolute and vested interest or absolute and vested interests in the whole of the last-mentioned fourth part of the said trust-monies, funds, and securities, or the unappointed part thereof and interest therein, then Upon the trusts, and for the ends, intents, and purposes hereinbefore declared concerning the first-mentioned half part of the moiety of the said trust-monies, funds, and securities hereinbefore limited In trust, in the first instance, for the benefit of my said daughter, [*younger daughter*], and her surviving husband and issue.

—on failure of the above trusts, the second moiety to go as younger daughter shall

56 *g* [29]. And in case there should be no person or persons who shall live to take a vested interest or vested interests in the whole of the last-mentioned moiety of the said trust-monies, funds, and securities, under or by virtue of the trusts,

powers, or authorities hereinbefore contained, then (subject to the trusts, powers, and authorities hereinbefore contained, and as to all, so much, and such parts of and interests in the said trust-monies, funds, and securities, as shall not be effectually vested, applied, or disposed of under or by virtue of the said trusts, powers, and authorities), UPON SUCH TRUSTS, and for such ends, intents, and purposes as my said daughter, [*younger daughter*], shall at any time or times [while sole] by any revocable or irrevocable deed or deeds, attested by one witness or more, or [whether sole or covert] by her last will and testament or any testamentary writing, direct or appoint; AND in default of and subject to any such direction or appointment, IN TRUST for my said daughter, [*younger daughter*], her executors, administrators, and assigns.

—appoint, and in default of appointment to her absolutely;

56 *g* [30]. PROVIDED ALWAYS, AND I HEREBY DIRECT, that as to all or any part or share of any trust-monies, funds, or securities whereof the annual produce and income shall not for the time being be payable to some person or persons for life, or otherwise, under or by virtue of any of the trusts of my will, and under or by virtue of some direction or appointment to be made in exercise of some power or authority hereby given, and to which trust-monies, funds, or securities, or part or share, some minor shall for the time being be presumptively or actually entitled under or by virtue of the trusts of my will, or under or by virtue of some such direction or appointment as aforesaid, my said trustees or trustee for the time being shall apply the whole or such part as they or he shall think fit of the annual produce and income thereof for or towards the maintenance or education of such minor, until he or she shall attain the age of twenty-one years; And that my said trustees or trustee for the time being either may themselves or himself so pay or apply the same, or may pay the same to the guardian or guardians of such minor for the purposes aforesaid, without seeing to the application thereof or being bound to inquire whether the maintenance of such minor is or ought to be otherwise provided for; And shall, during such minority as lastly aforesaid, accumulate all the residue (if any) of the same annual produce and income in the way of compound interest, by investing the same and all the resulting produce and income thereof from time to time in or upon any such stocks, funds, or securities as are hereinbefore authorised to be used for investments, for the benefit of the person or persons who under the trusts, powers, and authorities herein contained shall become entitled to the princi-

—maintenance of minors; (*General form*);

—trustees may pay maintenance-money to guardians;

—accumulation;

pal fund or share from which the same respectively shall have proceeded; With power for my said trustees or trustee for the time being to resort to the accumulation of any preceding year or years, and to apply the same for or towards the maintenance or education of the person or persons for the time being presumptively or actually entitled to the same (being under age as aforesaid) in the same manner as such accumulations might have been applied in case they had been annual produce or income arising from the original trust-fund in the year in which the same shall be so applied.

—authority to use accumulations for maintenance;

—advancement of minors. (*General form*).

56 *g*[31]. PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that it shall be lawful for my said trustees or trustee for the time being, at any time or times hereafter, to raise any part or parts, not exceeding in the whole one half of the then expectant or presumptive or vested legacy, portion, or share of any person, under or by virtue of any of the trusts, powers, or authorities herein contained, and pay or apply the same for his or her advancement or benefit, as they or he, the said trustees or trustee, shall think fit; PROVIDED ALWAYS, that no such advancement shall be made of the capital of any trust-monies, funds, or securities whereof the income shall for the time being be payable to any person for her or his life under any of the trusts, powers, or authorities aforesaid, without her or his consent in writing.

For such children as shall survive testator's widow, and the issue of children dying before tenant for life, and attaining twenty-one or leaving issue.

56 *h*. UPON TRUST to pay, transfer, or divide the same [trust-monies, funds, and securities] unto, between, or among such child or children of mine as shall survive me and my said wife (*a*), and attain the age of twenty-one years, and such child or children of any child of mine dying before me or before my said wife, or under the age of twenty-one years, as shall survive me and my said wife and attain the age of twenty-one years, or die under that age leaving issue, and if more than one in equal shares and proportions as between brothers and sisters, but so that the child or the children collectively of any child of mine dying before me or before my

As to postponing the vesting of portions until the death of the tenant.

(*a*) [It is not perhaps in general advisable to make the vesting of children's portions depend upon their surviving the tenant for life, though it may sometimes be well to postpone the vesting until they arrive at a more mature age than twenty-one, as in (56 *i*). But where no inconvenience is apprehended from postponing the vesting, the form in the text may be usefully adopted for the purpose of avoiding the probate or administration and legacy duties which would otherwise be payable on the shares of children dying before the tenant for life.]

said wife, or under the age of twenty-one years, shall take such share only as his, her, or their parent would have taken if living.

Trust for children at twenty-five; substitution of the children of any child dying under twenty-five, and of the issue of grandchildren dying under twenty-one, or (where not too remote) under twenty-five.

56 *i.* Upon trust to pay, transfer, or divide the same trust-monies, funds, and securities, unto, between, or among such child or children of mine as shall survive me and attain the age of twenty-five years, and the child or children living after my decease of any child or children of mine who shall be dead at my decease (*a*) or shall die under the age of twenty-five years and if more than one in equal shares and proportions as between brothers and sisters, but so that the child or the children collectively of any child of mine dead at my decease, or dying under the age of twenty-five years, shall take only such share as his, her, or their parent would have taken if living. Provided always, and I hereby direct, that in case any grandchild of mine, entitled to a share of the said trust-monies, funds, and securities under the foregoing limitation, and who shall be living at my decease or shall be of the age of four years or upwards at the time of the decease of the survivor of my children (*b*), should die under the age of twenty-five years leaving issue surviving him or her, or in case any grandchild of mine, entitled to a share of the said trust-monies, funds, and securities under the foregoing trusts, and who shall be born after my decease and shall be under the age of four years at the time of the decease of the survivor of my children, should die under the age of twenty-one years leaving issue surviving him or her, Then, and in every such case, the share or shares hereinbefore limited to such grandchild shall be held in trust for his or her child or children, and if more than one in equal shares and proportions (*c*).

(*a*) [*Viner* v. *Francis*, 2 B. C. C. 658; *Lee* v. *Pain*, 4 Hare, 250, ante, p. 318.]

(*b*) [The above qualification is necessary in order to avoid infringing the rule against perpetuities, and it is so expressed as to take in as many objects as possible.]

(*c*) [The effect of the above limitations may be produced by limiting the fund directly to the objects intended to take, without any clause of divestment and substitution; but the limitation then becomes very complex. Thus:—

Limitation to children at twenty-five and

"Upon trust to pay, transfer, or divide the said trust-monies, funds, and securities, unto, between, or among such

For two cousins for life, then for their children at twenty-one, &c., with cross limitation;

56 *k* [1]. Upon trust to pay the dividends, interest, and annual produce of the same to my two cousins, [*names and descriptions*], for their respective lives, in equal shares, for their separate use, independently of their respective husbands for the time being, and so as not to be subject to the debts, control, or engagements of such husbands, and so also as not to be assigned or anticipated by my said cousins respectively; and after the respective deceases of them my said cousins, the principal of their respective shares to be equally divided among such of their respective children, if more than one, as shall live to attain the age of twenty-one years or leave issue, and if but one such child, to such only child; And if either of my said cousins should die without having any child who shall live to attain the age of twenty-one years or leave issue, then as to the moiety or share of her so dying, In trust for the other of them my said cousins during her life, and after her decease, for her child or children, in the same manner in all respects as her original share; And if neither of my said cousins should have a child who shall live to attain the age of twenty-one years, then, as to the whole of the said trust-

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the children of those dying under twenty-five, with substitution of issue of grandchildren dying under twenty-five, or, where that would be too remote, under twenty-one.

child or children of mine as shall survive me and attain the age of twenty-five years, and such child or children of any child or children of mine who shall be dead at my decease or shall die under the age of twenty-five years, or, being born before my decease or at least four years before the decease of the survivor of my children, shall attain the age of twenty-five years, or, being born after my decease and less than four years before the decease of the survivor of my children, shall attain the age of twenty-one years, and the child or children of any grandchild of mine who shall die before me or under the age of twenty-one years, or, having been born in my lifetime or at least four years before the death of the survivor of my children, shall die under the age of twenty-five years, and who shall be the child of a son or daughter of mine dead at my decease or dying under the age of twenty-five years, and if more than one in equal shares and proportions as between or among brothers and sisters, but so that the issue of a child of mine shall collectively take only the share which such child would have taken if living, and the child or the children collectively of a grandchild of mine shall take only the share which such grandchild would have taken if living."

monies, funds, and securities, In trust for the survivor of them my said cousins absolutely.

56 *k*[2]. And I empower my said trustees or trustee for the time being, at discretion, to apply an adequate portion of the income of the expectant share of any and every child of my said cousins respectively, who at his or her mother's decease shall be under age, for his or her maintenance and education during minority, and to accumulate the unapplied part thereof, if any, in augmentation of the principal of the share whence the same shall have arisen, With power to apply such accumulations for the maintenance and education of any minor or minors for the time being presumptively entitled thereto. And I declare, that my said trustees or trustee shall not be bound to inquire into the applicability of any other fund for, or the liability of any other person to provide, maintenance for the objects of the aforesaid trust. And I also empower my said trustees or trustee, in their or his discretion, to pay any of the monies applicable to maintenance as aforesaid to the parent or guardian for the time being of any minor, for the purpose of being so applied, without being bound to see to the application thereof. And I also empower my said trustees or trustee (with the consent in writing of the parent entitled to the prior life-interest if she shall be then living, and after her decease in their or his own discretion) to apply any part not exceeding one half of the principal of each expectant share for the advancement in life of the child to whom such respective expectant share shall presumptively belong.

—maintenance;

—advancement.

56 *l*[1]. Upon trust to pay the annual produce and income arising therefrom unto my wife, [*name*], during her life, for her separate use and maintenance, and for the maintenance and education of my sons during their respective minorities, and of my daughters until they shall respectively marry (*a*), (*Or, for her separate use alone*). And, from and after the decease of my said wife, (*Trusts for children*; *On failure of children*)—

Income for wife for life, for maintenance of herself and children;

(*a*) [Where the residuary estate is given to the widow for her life, and there is no other fund applicable for the maintenance of the children, the widow's life-interest should, in general, be expressed to be for the maintenance of herself and the maintenance and education of her children.]

—then for brothers and sisters for their respective lives, in equal shares;

56 l^2. Upon trust to pay unto each of my brothers and sisters, during his or her life, the annual produce and income arising from the share of the said trust-monies, funds, and securities hereinafter limited in trust for his or her child or children, so that each brother or sister of mine shall from time to time be entitled to the income from such share or proportion of the said trust-monies, funds, and securities as his or her child or children shall, or in the case of an unmarried or childless brother or sister would, if he or she had any child or children, be presumptively entitled to for the time being under the trusts and limitations hereinafter contained; And as to each sister of mine, for her sole and separate use, free from the control, debts, and engagements of any husband, and so that she may not have power to alienate, dispose of, engage, or receive the same, or any part thereof, by way of anticipation; And, subject to the life-interests of my said wife and brothers and sisters respectively in the annual produce and income from the whole or any share or shares of the said trust-monies, funds, and securities,—

—subject to life-interests for children of brothers and sisters (including children of deceased brothers and sisters) attaining twenty-one or leaving issue, or (being daughters) marrying, and the children of deceased children, per stirpes;

56 l^3. Upon trust to pay, transfer, or divide the said trust-monies, funds, and securities, unto, between, or among such child or children of my brothers and sisters (including brothers and sisters already dead, or who shall be dead at my decease) as shall attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, and such child or children of any nephew or niece of mine dying before me as shall attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, in equal shares and proportions as between or among the children of the same parent, and also in equal shares and proportions as between or among the different families, so that the child or the children or issue collectively of one brother or sister of mine shall take an equal share with the child or the children or issue collectively of any other brother or sister, and so that the child or the children collectively of a deceased child shall take only the share which such deceased child would have taken if living.

—power for brothers and sisters to appoint to issue.

56 l^4. Provided nevertheless, and I hereby direct and declare, that it shall be lawful for any brother or sister of mine, by any deed or deeds, or by his or her last will and testament or any testamentary writing, to limit and appoint the share or shares of the said trust-monies, funds, and securities,

hereinbefore limited in trust for his or her child or children or grandchild or grandchildren as aforesaid, or any part or parts of such share or shares, unto, between, or among any one or more of his or her children or more remote issue (such issue being born in his or her lifetime), for such interest or interests, in such shares and proportions (if more than one), in such manner and form, and subject to such provisions, restrictions, or limitations over for the benefit of any other or others of such children or issue, as he or she shall think fit.

56 *l*[5]. PROVIDED, NEVERTHELESS, that no child or grandchild, to or in favour of whom or whose issue any such appointment shall be made, shall take any share or interest under the limitations or trusts hereinbefore contained in default of appointment, unless he or she, or his or her issue, shall bring the share or interest or shares or interests so appointed into equal distribution with the unappointed share or interest under the said limitations or trusts in default of appointment.

56 *m*. PROVIDED ALWAYS, AND I HEREBY DIRECT, that, if I should have no child or more remote issue who under the trusts herein contained shall live to acquire a vested interest in my said residuary personal estate and effects, and my said wife, [*name*], should be living and unmarried at the time of the failure of such children or issue, or should be living at the time of my decease, which shall last happen, then the whole of my said residuary personal estate and effects, or so much thereof as shall not have been applied under any of the powers herein contained, shall be IN TRUST for my said wife, her executors, administrators, and assigns; But, if my said wife should be then dead or married, then the whole of my said residuary personal estate and effects, or the unapplied part thereof, shall be IN TRUST for my sister, [*name*], of &c., her executors, administrators, and assigns.

In default of children living to acquire a vested interest, in trust for testator's wife if living and unmarried, and if not, then in trust for testator's sister.

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57 *a*[1]. (*Discretionary powers to convert real and personal estate; authority to let, manage, &c.* (52 *g*)).—I GIVE one equal half part of the income from my residuary real and personal estate unto my wife during her life. SUBJECT thereto, I GIVE my residuary real and personal estate unto such child or children of mine living at my decease, and such child or children of any child or children of mine dead in my lifetime, as shall survive me and attain the age of twenty-one years or marry, and his, her, or their heirs, executors, administrators, and as-

Income of one moiety for wife for life; subject thereto, residue to children and issue of deceased children, at twenty-one or marriage;

signs, if more than one in equal shares as between or among brothers and sisters, but so that the child or the children collectively of any deceased child shall take only such share as his, her, or their parent would have taken if living.

—maintenance;

57 a^2. I AUTHORISE my said trustees or trustee, during the minority of each of my said children or other issue, to receive and apply the whole or a competent part of the income from his or her expectant share towards his or her maintenance and education; and to invest the surplus thereof, and add the same to the capital of such share; With power to apply the capital of such accumulations towards the maintenance and education of the person or persons presumptively or actually entitled thereto, and with power to pay any maintenance or education money to the father or (whether the father be living or dead) to the mother, or to any person acting as guardian (whether duly authorised or not) of any such minor, without seeing to the application thereof, or taking notice whether such maintenance or education is or ought to be otherwise provided for. I AUTHORISE my said trustees or trustee, in their or his discretion (but not without the consent of my wife during her life) to call in or convert into money by sale or mortgage, and apply, not more than one-half of the expectant share or shares of any of such children or other issue, for his, her, or their advancement in life.

—advancement.

Annuity to wife.

57 *b*. UPON TRUST to pay to my wife, during her life, the annual sum of £——, to commence from my decease, and to be paid half-yearly, with a proportional part to complete the entire period from the day of my decease to the day of the decease of my wife; AND, subject thereto, upon trusts corresponding as nearly as may be with the limitations herein contained of my real estate. (*Real estate devised to the children as tenants in common, with discretionary power of sale*).

—subject thereto, upon trusts of realty.

Residue to surviving issue, per stirpes.

57 *c*. I GIVE the residue of my personal estate to my surviving child or children, and the issue (*a*) of any deceased child or children of mine, in equal shares as between or among brothers and sisters; But so that no issue of a grandchild living at my death shall be included in this gift; And so that the issue of a deceased child or grandchild shall take only the

(*a*) [The time for ascertaining the members of the class will be the time of the testator's death.]

share which such child or grandchild would have taken if living. (*Maintenance, &c.* (57 a^2)).

57 d^1. In trust for such child or children of mine as shall survive me and attain the age of twenty-one years or leave issue, and such child or children of any child or children of mine dying before me as shall [survive me (*a*) and] attain the age of twenty-one years or leave issue, in equal shares as between or among brothers and sisters, but so that the child or the children collectively of any deceased child of mine shall take only the share which such deceased child would have taken if living. For testator's children attaining twenty-one or leaving issue, and the children of deceased children, per stirpes;

57 d^2. And, as to the share or shares of any girl or girls for her or their separate use, [without power of anticipating or disposing of the income or capital thereof otherwise than by will.] —share of girls for their separate [and inalienable] use.

57 *e*. In trust for such child or children of mine as shall survive me and attain the age of twenty-one years or leave issue, or, being a daughter or daughters, attain that age (*b*) or marry, and such child or children of any child or children of mine dying before me as shall survive me and attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of mine shall take only the share which such deceased child would have taken if living. And, as to the share or shares of any girl or girls, for her or their separate use, without power of anticipating or disposing of the income or capital thereof otherwise than by will. Children of testator's sons attaining twenty-one or leaving issue, daughters attaining twenty-one or marrying, and the children of deceased children; —shares of girls for their separate and inalienable use.

57 *f*. In trust for such child or children of mine as shall survive me and also survive my said wife and attain the age of twenty-one years or leave issue, or, being a daughter or Children of testator who shall survive his wife and attain

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(*a*) [The qualification of surviving the testator should not, perhaps, be annexed to the gift to the grandchildren, if it were clear that the 33rd section of the Wills Act (ante, p. 427) extended to gifts to classes; but, while that question is in doubt, it is better to prevent litigation by an express declaration in one way or the other.]

(*b*) [The words "attain that age or" would be understood if not expressed: *Lang* v. *Pugh*, 1 You. & Col. C. C. 718.]

twenty-one or marry, and the children of children dying before testator's wife.

daughters, attain the age of twenty-one years or marry, and such child or children of any child or children of mine dying before me or before my said wife, as shall survive me and also survive my said wife and attain the age of twenty-one years or leave issue, or, being a girl or girls, attain the age of twenty-one years or marry, in equal shares as between or among brothers and sisters. But so that the child or the children collectively of any deceased child of mine shall take only the share which such deceased child would have taken if living. And, as to the share or shares of any girl or girls for her or their separate use, without power of anticipating or disposing of the income or capital thereof otherwise than by will.

For son at twenty-one; —if he die under twenty-one or before testator, for his children attaining twenty-one or leaving issue, or (daughters) marrying; substitution of children of deceased children;

57 *g*. In trust for my son, [*name*], in case he should survive me and attain the age of twenty-one years, for his absolute use and benefit. But, if my said son should die before me or under the age of twenty-one years, then In trust for such child or children of my said son as shall survive me and attain the age of twenty-one years or leave issue, or, being a daughter or daughters, attain that age or marry, and such child or children of any child or children of my said son dying before me as shall attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of my said son shall take only the share which such deceased child would have taken if living. And, as to the share or shares of any girl or girls, for her or their separate use, without power to anticipate or dispose of the income or capital thereof. And in case neither my said son, nor any child or grandchild of my said son, should take a vested interest in the said trust-monies and premises under the foregoing trusts, then (*Trusts for brothers and sisters and their issue* (58 *d*) *or* (58 *e*), *or other ulterior trusts*).

—on failure of the above trusts, over.

Residuary personalty for widow for life, for maintenance of children;

57 *h*. I declare that my said trustees or trustee shall be possessed of my said residuary real and personal estate, Upon trust to pay the income from time to time actually arising therefrom unto my wife during her life, [for the maintenance of herself and my [infant] sons and unmarried daughters (*a*)];

(*a*) [See note (*a*), p. 666.]

AND, after her decease, to transfer the capital thereof in such manner, for the benefit of any child or children or other issue of mine, (such issue being in existence before her decease), as my wife shall by deed or will (notwithstanding coverture) appoint; AND, subject thereto, to such child or children of mine as shall survive me and attain the age of twenty-one years or leave issue, or, being a daughter or daughters, attain that age or marry, and such child or children of any child or children of mine dead at my decease as shall survive me and attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, in equal shares as between brothers and sisters; But so that the child or the children collectively of any deceased child of mine shall take only such share as his, her, or their parent would have taken if living. (*Hotchpot clause* (57 l^2); *Maintenance, &c.* (57 a^2).

then for issue as she shall appoint;

in default, to children at twenty-one or marriage, and issue of deceased children, per stirpes.

57 *i.* UPON TRUST, during the infancy of any of my children or more remote issue who shall be presumptively entitled to a share of my residuary estate, to apply, at their or his discretion, the whole or a part of the income arising from the expectant share of such child or other issue towards his or her maintenance and education; And to accumulate the surplus, if any, of such income in augmentation of the share from which the same shall arise; With power to resort to such accumulations for future maintenance and education; AND UPON FURTHER TRUST to transfer the capital of my residuary estate to such child or children of mine, and such issue living at my decease of any child or children dead before me, as shall survive me and attain the age of twenty-one years or marry, if more than one in equal shares as between or among brothers and sisters; But so that no child of any grandchild of mine shall be included in this gift if such grandchild survive me; And so that the child or the children collectively of any deceased child or grandchild shall take only such share as his, her, or their parent would have taken if living. BUT, I GIVE the share of each daughter or other female issue of mine to my said trustees or trustee, IN TRUST to pay to her the income thereof for her separate and inalienable use during her life; And after her decease to be possessed of the capital thereof, upon such trusts as she shall by will, whether married or sole, or, being unmarried, by deed appoint; And, in default of appointment, IN TRUST for such her child or children as shall survive me and attain the age of twenty-one years or marry, if more

Maintenance;

—accumulation of surplus income;

—capital to children and the issue of children dying before the testator, at twenty-one or marriage;

—trust for separate use of female legatees for life; and then as she shall appoint;

in default of appointment to her children;

than one in equal shares; And in default of such children, IN TRUST for such person or persons as would be entitled thereto if the same were her personal estate and she had died without leaving a husband, and if more than one in the like shares. AND I EMPOWER my trustees or trustee, at any time or times, in their or his discretion, to apply, for the benefit and advancement in life of each of my children or other issue, not more than one-half of his or her expectant share.

—advancement.

For children, or their issue, at twenty-one [except one son].

57 *k.* (*Bequest of annuity to sister, and legacies to sister's children* (19 *c*)).—AND, subject to the trusts aforesaid, to pay or transfer the residue of the said trust funds unto such child or children of mine [other than my said son, [*name*]]; and such child or children of any child or children of mine dead at my decease, [other than my said son, [*name*]], as shall survive me and attain the age of twenty-one years or marry, if more than one in equal shares as between or among brothers and sisters; But so that the child or the children collectively of any deceased child shall take only such share as his, her, or their parent would have taken if living.

Children and issue of deceased children for life, and then to their issue at twenty-one, and subject to a power of appointment;

57 *l*[1]. IN TRUST to pay the income therefrom unto between or among such child or children of mine as shall survive me, and the issue living at my decease of such child or children of mine as shall then be dead (other than the issue of a grandchild then living), during their respective lives, in equal shares as between or among brothers and sisters, during their respective lives; But so that the issue of any deceased child or grandchild shall collectively take only the share which such deceased child or grandchild would have taken if living. And after the decease of each such child or other issue of mine, then, as to the share whereof the income is so given to him or her for life, UPON SUCH TRUSTS, for the benefit of any one or more of his or her issue (born in his or her lifetime), as he or she shall by deed or will appoint; And, subject thereto, IN TRUST for such his or her child or children as shall come of age or marry, and if more than one in equal shares, AND, on failure of the trusts aforesaid, as to such share, UPON THE TRUSTS herein declared concerning the other shares or share, including this present limitation; And, on failure of all the trusts aforesaid, as to such share, IN TRUST for the person to whom the income thereof is hereinbefore made payable, his or her executors, administrators, and assigns.

—cross limitations;

57 l^2. PROVIDED ALWAYS, that no grandchild or other issue of mine, to whom or to whose issue any appointment shall be made under the foregoing power, shall take any benefit under the foregoing trusts in default of appointment, without bringing such appointed share or interest into equal distribution under the said trusts in default of appointment, with the unappointed part of or interest in the said trust-premises, or allowing for the same. (*Maintenance* (59 a^1)). —hotchpot.

57 *m*. I DIRECT my trustees or trustee, during my said wife's life, to pay or apply the income from my residuary personal estate to or for the benefit of my wife and such child or children of mine, and such issue of any deceased child or children of mine, as shall from time to time be living, if more than one in equal proportions; BUT so that the issue of a living grandchild shall not be entitled to any part of such income, and so that the child or the children collectively of a deceased child or grandchild shall be entitled only to the benefit of such a share of such income as his, her, or their parent would have been entitled to if living; The income so to be applied for the benefit of an infant child or children or more remote issue of mine, to be paid to my wife, and to be by her applied for that purpose; And the income so to be paid to any married daughter or daughters of mine, to be for her or their separate and inalienable use. SUBJECT to the trusts aforesaid, I DIRECT my trustees or trustee to be possessed of my residuary personal estate. (*Trusts for children, &c.* (57 *e*)). Income during wife's life to be applied for equal benefit of herself and children, and the issue of deceased children, per stirpes; —trusts after wife's decease.

57 *n*. UPON TRUST to pay the income therefrom unto my said wife, during her widowhood; AND, after her decease or marriage, to pay or divide the capital of the said trust-fund unto or equally between or among [*step-daughter*], (the daughter of my said wife by her former husband), if she should attain the age of twenty-one years or marry, and such child or children of mine, and such child or children of the said [*step-daughter*], (in case she should not survive me), and of any child or children of mine now dead or dying before me, [(other than any issue of mine who shall take my real estate under the gift hereinafter contained, and shall not be my only child or grandchild)], as shall survive me and attain the age of twenty-one years or marry; But so that the child or the children collectively of the said [*step-daughter*], or of any Income to wife during widowhood; after her death or marriage, capital to children (including step-daughter) at twenty-one or marriage, [except issue taking real estate];

—maintenance.

deceased child of mine, shall take only such share as his, her, or their parent would have taken if living. I AUTHORISE my said trustees or trustee, after the decease or marriage of my wife, and during the minority of any such legatee, to apply all or a sufficient part of the income arising from such legatee's presumptive share in or towards his or her maintenance and education; And to invest the surplus (if any) of such income upon such security as aforesaid, and add the same to the capital of such presumptive share; But with power at any time to apply such accumulated income in or towards the maintenance and education of the person or persons presumptively entitled thereto.

Income of residue of real and personal estate for wife during widowhood, for maintenance of herself and children;
—after marriage one-half of income for wife, and the residue for children;
—maintenance after death of wife;
—capital to children at twenty-one or marriage;

57 *o*. IN TRUST, after paying all current expenses, to pay the income therefrom unto my wife during her widowhood, for her support and the maintenance and education of my children; AND, if my wife should marry again, then to pay one-half of such income to her during her life, for her separate and inalienable use; AND, subject to the trusts aforesaid, to convey and transfer my residuary real and personal estate unto such child or children of mine living at my decease, and such child or children living at my decease of any child or children of mine already dead or dying before me, as shall attain the age of twenty-one years or marry, his, her, or their heirs, executors, administrators, and assigns, if more than one in equal shares; But so that the child or the children collectively of any deceased child shall take only such share as his, her, or their parent would have taken if living. SUBJECT TO THE TRUSTS AFORESAID, (*Maintenance, &c.* (57 a^2)).

Subject to annuities, income of general estate for maintenance of grandchildren and remoter issue, until the expiration of lives and twenty-one years; the capital among all issue living at that time equally; accumulation for twenty-one years from testator's death;

57 *p*. I DIRECT my trustees or trustee to apply the residue of the income from my property towards the education and support of all my grandchildren and more remote issue living at my decease or born afterwards, in such proportions as my trustees or trustee shall think fit, until the expiration of the period of twenty-one years from the decease of the survivor of such of my children and grandchildren as shall be living at my decease; at the expiration of which period, subject to the trusts aforesaid, I DIRECT my trustees or trustee to divide the whole of my property among all such of my issue as shall then be living, in equal shares, per capita. AND I AUTHORISE my trustees or trustee, during the period of twenty-one years

from my decease (*a*), in their or his discretion, to apply only a part of the income hereby given for the education and support of each of my grandchildren and more remote issue, towards his or her maintenance, during his or her minority and the said period of twenty-one years from the day of my decease, and to accumulate the surplus income during such time, and to be possessed of such accumulations upon the trusts herein declared of my general estate. AND if, at any time or times after the expiration of twenty-one years from my decease, there should be no grandchild or more remote issue of mine, then I GIVE the income of my residuary estate, until there shall be such grandchild, unto such my child or children as for the time being shall be living, and the survivors or survivor of them, if more than one in equal shares. AND if no issue of mine should be born or live to take an absolute interest in the capital of my general estate, then I GIVE the same to such of the issue of my father and such of the issue of my mother as shall be living at my decease or at the time when such issue of mine shall fail (whichever shall last happen), in equal shares, per capita.

—in default of issue, equally among issue of testator's father and mother then living, per capita.

57 *q*. IN EXERCISE of the power contained in my marriage settlement, I DIRECT that the trustees or trustee for the time being under such settlement shall pay the income from the trust-funds therein comprised and subjected to my appointment unto my present (*b*) husband or his assigns, during his

Appointment, under power, of income to husband for life; capital to children [except eldest son]; in

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(*a*) [This provision, if not restricted as it is, might infringe to some extent against the Thellusson Act, (ante, p. 196). The enactment prohibiting accumulation of income beyond a certain period, unlike the rule against perpetuities, does not make entirely void a provision for accumulation which transgresses the limits which that act prescribes; but only invalidates the direction for accumulation during that part of the period which exceeds the limits. An express restriction is, therefore, not absolutely necessary; but is useful for the purpose of informing the trustees and parties interested as to their duties and rights, and of preventing questions as to the destination of the income after the period has elapsed. Of course, a direction to accumulate, which would, prior to the passing of the Thellusson Act, have been wholly void for remoteness is not set up by the operation of that act, so as to be valid for the period of twenty-one years: *Boughton* v. *James*, 1 Coll. 26.]

(*b*) [So far as it affects property which would not go to the heir or personal representative of the testatrix in default of appointment, the will would not be revoked by a subsequent marriage: Stat. 7 Will. 4 & 1 Vict. c. 26, s. 18, ante, p. 423.]

default of children, to husband absolutely.

life; AND, after his decease, shall transfer the said trust funds unto such child or children of mine [other than my said son, [*name*]] as shall attain the age of twenty-one years or marry; (*add, if authorised, substitutionary gift to issue of deceased children, as in* (57 *d*[1])), if more than one in equal shares; AND, if there should be no such child, shall transfer the said trust-funds unto my present husband, his executors, administrators, or assigns. (*Maintenance and advancement,* (57 *a*[2])).

Trusts of one moiety of residue;

—to pay one-half of the income to wife of (improvident) son;

—to pay to son such part of the residue of such income, not exceeding £——, as trustees may think fit;

—as to capital of such moiety, for son's children and the issue of deceased children at twenty-one or marriage;

—on failure of such trusts, to be held on trusts of the other moiety;

—as to the other moiety, for daughter and her children;

—cross limitations;

57 *r*[1]. AS TO one equal moiety of my residuary estate, I DIRECT, that my trustees or trustee shall pay one equal moiety of the income from such moiety unto [*name*], the present wife of my son, [*name*], during her life, for her separate and inalienable use during any coverture; AND, after her decease, shall pay such moiety of such income unto any future wife or wives of my said son successively during her life or their respective lives, for her or their separate and inalienable use during any coverture; AND, subject to the aforesaid trust, I AUTHORISE my trustees or trustee, in their or his absolute discretion, from time to time, and at such time or times as they or he shall think proper, to pay or apply any part or parts of the income from the said moiety of my residuary estate (not exceeding in any one year the sum of £——) to or for the benefit of my said son, in such manner in all respects as my trustees or trustee shall think proper. SUBJECT to the trusts aforesaid, I DIRECT my trustees or trustee to be possessed of the said moiety of my residuary estate, IN TRUST for such child or children of my said son in being at any time before his decease, and such child or children of any child or children of my said son dead at my decease, as shall survive me and at any time or times in the lifetime of my said son or afterwards attain the age of twenty-one years or marry, if more than one in equal shares; But so that the child or the children collectively of any grandchild of mine shall take only such share as his, her, or their parent would have taken if living. AND, on failure of the trusts aforesaid, I DIRECT that the said moiety of my residuary estate shall be held upon the trusts herein declared concerning the other moiety thereof. As to the other moiety of my residuary estate, I DIRECT my trustees or trustee to pay the income therefrom (*Trusts for daughter and her issue* (43 *a*[7]) (43 *a*[8])); AND, on failure of the trusts aforesaid, I DIRECT that the said moiety of my residuary estate shall be

held upon the trusts herein declared concerning the other moiety thereof.

57 r^2. I DIRECT my trustees or trustee (but subject to the trusts hereinbefore declared concerning the income of my residuary estate or any part thereof,) to pay the income from the presumptive share for the time being of each adult or married child or grandchild of my said son unto such child or grandchild, his or her executors or administrators, until his or her share shall be ascertained and transferred (*a*); AND to apply all or a competent part of the income from the presumptive share of any minor under my will towards his or her maintenance and education; And to invest the surplus (if any) of such income, and add the same to the capital of the share from which it shall arise; With power to apply such accumulations towards the maintenance or education of the person or persons for the time being presumptively entitled thereto. PROVIDED, that, if at any time or times after the expiration of twenty-one years (*b*) from my decease, my

—income from adult children's presumptive shares to be paid to them;

—maintenance of infant legatees;

—accumulation of surplus income;

—income arising after twenty-one years,

(*a*) [As the whole of the income is not disposed of during the son's life, it is necessary to provide for its destination in the event of a child's becoming of age or marrying in the son's lifetime; because, as the trust for the children is framed, children born after that event are admissible, and the amount of such adult or married child's share in the capital (and, consequently, in the income) of the trust fund cannot be ascertained until the death of the parent.]

Accumulation of income.

(*b*) [The Thellusson Act (39 & 40 Geo. 3, c. 98, ante, p. 196) does not prohibit the accumulation of income beyond the period of twenty-one years from the testator's decease, if (among other cases) the accumulation is directed to be made during the minority of the person who would, if of full age, be entitled to the income, (sect. 2), or if the provision is "for *raising portions* for any *child or children* of any person *taking any interest* under any such conveyance, settlement, or devise:" (sect. 3). The meaning of this latter proviso has not been judicially settled, either as to what will amount to a provision for "raising portions," or as to what interest the parent of the objects of the accumulation must take to bring the case within the exemption. (See as to what is considered to be a portion, with reference to the doctrine of satisfaction, *Ex parte Pye*, 18 Ves. 140; *Powys* v. *Mansfield*, 3 Myl. & Cr. 359. And see Hargrave on the Thellusson Act, 191; *Bacon* v. *Proctor*, Turn. & R. 31; *Shaw* v. *Rhodes*, 1 Myl. & Cr. 159, 5 Cl. & Fin. 121; *Elborne* v. *Goode*, 13 Law J., N. S., Ch., 394). The provision in the text could not be treated as a provision for *raising* "portions" for the son's children, and it is necessary to prevent any question by restricting the accumulation to the period of twenty-one years from the testator's death.]

and not otherwise disposed of, to be paid to [son or to] legatees of the other moiety;

said son should be living, and no issue of my said son should be living, then and thenceforth, so long as my said son shall be living without issue, such income from my said residuary estate as shall not be otherwise applied under the trusts hereinbefore contained shall be [paid to my said son for his own use, *or*,] paid and applied in such manner as if the same were income arising from the moiety of my residuary estate hereinbefore disposed of for the benefit of my said daughter and her issue. I AUTHORISE my trustees or trustee (subject to the trusts hereinbefore declared concerning the income of my residuary estate) to raise by mortgage, sale, or otherwise, and apply, not more than one-half of the presumptive share of any minor under my will, for his or her advancement in life.

—advancement.

One-ninth of income from residue to each of five sons until twenty-five;

—and then one-ninth of the capital to be transferred to him, or, if he die under

57 *s*[1]. I DIRECT my said trustees or trustee to pay one equal ninth part of the income from my said residuary real and personal estate unto each of my sons, [*five sons*], until he shall attain the age of twenty-five years, and then to transfer unto him one equal ninth part of the capital of my said residuary estate. AND (*a*), if any of my said sons be now dead or should die before me or under the age of twenty-five years, I GIVE the share or shares intended for him (as well accrued under this or any subsequent gift as original),

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(*a*) [Where a testator intended to discourage the marriage of any of his sons under the age of twenty-five years, but to provide for the children of any son who should die before him, unless he should revoke the gift to such children, the clause was thus expressed:—

Gift over on death under twenty-five.

"AND if any of my said sons be now dead or should die before me, I GIVE the share or shares intended for him (as well accrued under this or any subsequent gift as original) unto such his child or children as shall at any time or times attain the age of twenty-one years or marry, if more than one in equal shares; AND, in default of such issue, I GIVE such share or shares, UPON THE TRUSTS herein declared concerning the other shares of my residuary estate; AND, if any of my said sons should die after my decease under the age of twenty-five years without having been married before my decease, I GIVE the share or shares intended for him (as well original as accrued under this or any other gift in my will) UPON THE TRUSTS herein declared concerning the other shares of my residuary estate."]

unto such his child or children as shall at any time or times attain the age of twenty-one years or marry, if more than one in equal shares. AND in default of such issue, I GIVE such share or shares upon the trusts herein declared concerning the other shares of my residuary estate. I DIRECT my said trustees or trustee, out of the remaining four-ninth parts of my residuary estate, to pay £—— to each one of my three daughters, [*names*], and my son, [*name*], who shall survive me; AND, subject thereto, to pay the income from one of such ninth parts unto each of my said daughters and son, during his or her life, and, as to each daughter, for her separate and inalienable use.

that age or before testator, to his children at twenty-one or marriage, with cross limitations over;

—income of remaining four-ninths to the daughters and son for life, (subject to forfeiture on alienation) and capital as each shall appoint by will;

57 *s*[2]. BUT if any of my said daughters (being unmarried) or my said son should become bankrupt or insolvent, or do any act by means whereof the income hereby intended for her, him, or them would, but for this proviso, become vested in or payable to any other person or persons, then my said trustees or trustee shall invest and accumulate such income until the death or respective deaths of the child or children who shall have so forfeited the same, or the expiration of twenty-one years from my decease, (whichever shall first happen), and add such accumulations to the capital of the share or respective shares from which the same shall have arisen; AND, if such accumulation should cease in the lifetime of any such child or children, shall pay such income, during the remainder or respective remainders of the life or lives of such child or children, unto the person or persons for the time being actually or presumptively entitled to the capital from whence the same shall arise, and if more than one in the same proportions. SUBJECT to the trusts aforesaid, I DIRECT my said trustees or trustee to transfer the capital of the share or shares (as well accrued as original) whereof the income is hereby given to each of my said daughters and my son, in such manner as such daughter (notwithstanding any coverture) or son shall by will appoint; AND, subject thereto, (and whether she or he should die in my lifetime or after my decease), to such his or her child or children as shall at any time or times attain the age of twenty-one years or marry, if more than one in equal shares; AND, if there be no such child, to transfer and pay such share or shares and the income therefrom in manner herein directed concerning the other shares of my said residuary estate.

—accumulation of forfeited income;

—in default of appointment, to children at twenty-one or marriage.

As to estate at —— and £——, to apply so much of income and capital as trustees shall think fit (if any) for benefit of son;

57 t^1. And, subject to the trusts and powers aforesaid, and as to my estate at ——, and the proceeds thereof if sold as aforesaid, and also the sum of £—— out of my personal estate, Upon trust from time to time, if and as and when my trustees or trustee shall think fit, to pay to or apply in any manner they or he shall think fit for the benefit of my son [*name*], any part or parts or the whole of the actual income from the said estate at —— and sum of £——; And also any part or parts or the whole of the capital of the said sum of £—— [and of the proceeds of the sale of all or any part or parts of the said estate at ——;] And to invest and accumulate any unapplied income, and add the same to the capital, with power to apply such accumulations in manner as aforesaid. And subject to any such payment and application as aforesaid, from time to time, in the lifetime of my said son [*name*], if and as and when my trustees or trustee shall think fit, to apply any part or parts or all of the said income [but not the] capital monies, and accumulations to or for the separate use and benefit of any wife or issue of my said son [*name*], or any of them; And in case at or after the expiration of twenty-one years from my decease my said son [*name*] should be living, and there should be no wife or child of my said son living (*a*), then, as to so much of the said income as shall thenceforth accrue during my said son's life, and not be applied as aforesaid, Upon trust to dispose thereof as if the same were income arising from my hereditaments at —— hereinafter disposed of [*or*, from the sum of £—— hereinbefore given in trust for [*name*], and her issue.]

—to accumulate surplus income;

—unapplied income and principal during son's life to his wife and issue, if trustees think fit;

—proviso, if direction for accumulation should transgress the law, that income, not otherwise applied, shall be applied upon trusts referred to;

57 t^2. And, after the decease of my said son, [*name*], as to my said estate at ——, and the proceeds thereof, and the said sum of £——, and such accumulations of the income therefrom respectively as shall remain, Upon [such trusts, for the benefit of any issue of my said son, [*name*], born before his decease, as my said son, [*name*], shall by will appoint; And subject thereto (*trusts for children*, (58 *b*)); And if there be no such child or grandchild, upon such trusts for the benefit of any person or persons as my said son shall by deed or will

—ultimate trust for son's issue as he shall appoint by will; in default of appointment, to children, &c., equally; if no issue, as son shall appoint generally by will; in default of appointment, over.

(*a*) [The direction for accumulation would be void after twenty-one years, and if there were no alternative object of the trust pointed out, the trustees would, it is conceived, be under the necessity of choosing between the son and the testator's next of kin.]

appoint, and subject thereto UPON] SUCH TRUSTS as are herein declared concerning, &c.

57 *u*[1]. IN TRUST for my son, [*name*], his executors, administrators, and assigns, if he attain the age of twenty-one years; but if he die in my lifetime, or under that age, then IN TRUST for such his child or children as shall attain that age or marry, (if more than one in equal shares), and his, her, or their executors, administrators, and assigns; AND, on failure of the aforesaid trusts, then, as to one equal fourth part of the said trust-premises, IN TRUST for my wife, her executors, administrators, and assigns, in lieu of her dower and free-bench; And as to the residue thereof, or, if my wife should die before me, as to the whole—

For son at twenty-one; or, if he die before testator or under twenty-one, for his children at twenty-one or marriage;

—if no child, as to one-fourth for wife absolutely; as to residue, for three nieces for life, and their children, with cross limitations; if no child, as surviving niece shall appoint, or to her next of kin.

57 *u*[2]. IN TRUST to pay one-third of the income therefrom unto each of my three nieces, [*names*], during her life, for her separate and inalienable use; And, after her decease, to transfer one-third of the capital thereof to such her child or children living at my decease, and such child or children then living of any her child or children now dead or dying before me as shall attain the age of twenty-one years or marry, (if more than one in equal shares), and his, her, or their executors, administrators, and assigns; But so that the child or the children collectively of any deceased child shall take only the share which his, her, or their parent would have taken if living; And if there be no such issue, then to be possessed of such third part of the last-mentioned trust-premises and the income therefrom, upon the trusts herein declared concerning the other two third parts thereof and the income therefrom; And, if there be no such child of any of my said nieces, then to transfer the whole of the last-mentioned trust-premises in such manner as the survivor of my said nieces shall by will, or, being sole, by deed appoint; And, subject thereto, in such manner as if the same were part of her personal estate, and she had died without leaving a husband.

57 *v*[1]. UPON TRUST, (*a*) to divide my said residuary estate into as many equal parts as I shall have children surviving

For testator's issue, if any, by reference

(*a*) [This concise provision for children is proper, although there be no children, if the testator's wife may possibly have any.]

to trusts for brother and his issue; if no children,

me or leaving issue who shall survive me; And to be possessed of one of such parts, and the income therefrom, Upon trusts for the benefit of each such child and his or her issue, corresponding as nearly as may be with the trusts hereinafter declared as to one third share of my residuary estate in favour of my brother, [*name*], and his issue, in the event of the failure of the trusts now declared in favour of my own issue; And, on failure of all the trusts hereinbefore declared concerning any of such parts, to be possessed thereof upon the trusts herein declared concerning the others or other of such parts; And if I should have only one such child, to be possessed of all my said residuary estate upon the like trusts for the benefit of such child and his or her issue. And, subject to the trusts aforesaid, shall be possessed of my said residuary estate—

as to one-third for brother for life; then to his children as he shall appoint; and in default, equally;

57 *v*[2]. Upon trust, as to one equal third share of my said residuary estate, to pay the income therefrom unto my brother, [*name*], during his life, and after his decease unto his widow during her life; And, after her decease, to transfer the capital of such third share unto or for the benefit of any child or children of my said brother, [*name*], in such manner and (if more than one) in such proportions as he shall by deed or will appoint; Provided, that no such appointment shall vest any interest in any such child before his or her majority or marriage; And, subject thereto, to transfer such third share unto such child or children of my said brother, and such child or children living at my decease of any child or children of my said brother who shall be dead at my decease, as shall attain the age of twenty-one years or marry, if more than one in equal shares as between brothers and sisters; Provided that the child or children of any deceased child shall take only such share as his, her, or their parent would have taken if living. (*Hotchpot clause*, (56 *l*[5])). And, on failure of the trusts aforesaid shall be possessed of such third share upon the trusts herein declared concerning the other shares of my residuary estate.

—on failure of such trusts, upon trusts declared of the other two thirds.

As to four-sixths of another third, for

57 *v*[3]. And, as to one other equal third share of my residuary estate, shall (*a*) pay one equal sixth part of the income

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Trusts for issue of deceased brother per capita.

(*a*) "transfer the same unto such issue of my deceased brother, [*name*], as shall be in existence at the time of my decease, [*or*, when the youngest surviving child of my said

therefrom unto each of the four children of my deceased brother, [*name*], during his or her life, and, while any such my niece shall be married, for her separate and inalienable use; And, after his or her decease, shall transfer one equal sixth part of the capital of such third share of my residuary estate unto such child or children of each such my nephew or niece as shall attain the age of twenty-one years or marry, if more than one in equal shares; And shall transfer one other equal sixth part of such third share of my residuary estate unto such child or children of my deceased nephew, [*name*], as shall attain the age of twenty-one years or marry, if more than one in equal shares; And shall transfer the remaining sixth part of such third share of my residuary estate unto such child or children of my deceased niece, [*name*], as shall attain the age of twenty-one years or marry, if more than one in equal shares; And shall be possessed of every such sixth part of the said third share of my residuary estate whereof all the trusts hereinbefore declared shall fail, upon such of the trusts herein declared concerning the other parts of such third share as shall be subsisting; And, on failure of all the trusts hereinbefore declared concerning such last-mentioned third share of my residuary estate, shall be possessed thereof upon the trusts herein declared concerning the other shares of my residuary estate.

children of deceased brother, for life, and then for the grandchildren;

—as to other two-sixths, for children of deceased nieces;

—cross limitations over;

57 v^4. And, as to the remaining third share of my residuary estate, shall from time to time pay or apply all or any part or parts of the capital thereof and income therefrom, unto such person or persons, in such manner, upon such trusts, for the benefit of my brother, [*name*], and subject to such (if any) personal superintendence on the part of my said trustees or trustee, as they or he shall think fit; And, after the decease of my said brother, shall dispose of the residue (if any) of such third share of my residuary estate in such manner as if the same were part of my said brother's personal estate, and he had died intestate (*a*). (*Maintenance and advancement* (59 *c*)).

—as to remaining third, to apply income or capital *for benefit of lunatic brother*;

—after his death, to divide any surplus among his next of kin;

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deceased brother shall attain the age of twenty-one years], and shall attain the age of twenty-one years, if more than one in equal shares, per capita."

(*a*) [These last words will exclude any question as to the brother's capacity, in case it should be alleged that he had left a will.]

(*Residue of realty and personalty*)—to be divided into as many parts as there shall be children;

57 *w*[1]. I DIRECT my said trustees or trustee, in case any child of mine by my present wife, or any issue of any child of mine by my present wife, should survive me, to divide my residuary estate into as many equal parts as there shall be children of mine living at my decease or leaving issue living at my decease. AND, [as to two of such parts, to pay the income therefrom unto my wife, during her life, for her separate and inalienable use, and for the maintenance of my son, [*name*], and my daughter, [*name*]: AND after my wife's decease] to transfer one of such parts unto my son, [*name*], his heirs, executors, administrators, or assigns: AND to pay the income from the other of such parts unto my daughter, [*name*], during her life, for her separate and inalienable use; AND after her decease, to transfer the capital of such part in such manner as she shall by will, whether married or sole, or, being unmarried, by deed appoint: AND, subject thereto, to transfer the same to such child or children of my said daughter as shall attain the age of twenty-one years or marry, if more than one in equal shares, and his, her, or their heirs, executors, administrators, and assigns; and as to any daughter or daughters, for her or their separate use. AND, on failure of the aforesaid trusts as to either of the said parts by lapse or otherwise, to be possessed thereof upon the trusts hereinbefore declared concerning the other of them. AND, on failure of the aforesaid trusts as to both of the said parts by lapse or otherwise, to be possessed thereof upon the trusts herein declared concerning the other part or parts of my residuary estate. AND, as to the other part or parts of my residuary estate, (and, on failure by lapse or otherwise of the trusts hereinbefore declared in favour of my said children, [*names*], as to the whole of my residuary estate), to transfer the same unto my wife, her heirs, executors, administrators, and assigns, absolutely; And, if she should die before me,

—as to two of such parts, for son and daughter by former wife, as to daughter for life, and then for her children;

—cross limitations of the two shares;

—as to the other parts, for widow absolutely;

57 *w*[2]. TO PAY the income therefrom unto my child or children living at my decease, and the child or children living at my decease of any child or children of mine then dead, (other than the said [*children by former wife*] and their issue), during his, her, or their life or respective lives, if more than one in equal shares as between brothers and sisters; and as to a female or females, for her or their separate and inalienable use: But so that the child or the children collectively of any child of mine shall take only such share as his, her, or their parent would have taken if living;

—or if she be dead, for children by her for life,

57 w^3. And, after the decease of each such child or grandchild of mine, to transfer a share of the capital of my residuary estate proportionate to the share of the income thereof hereinbefore given to him or her, unto or for the benefit of such his or her issue living at his or her decease, and in such manner as he or she shall by will or (being a male or unmarried female) by deed appoint. And, subject thereto, to transfer the same unto such his or her child or children as shall attain the age of twenty-one years or marry, and his, her, or their heirs, executors, administrators, and assigns.

—then for their issue per stirpes in equal shares, (subject to power of selection);

57 w^4. Provided that the foregoing trusts in default of appointment shall not extend to any person to whom [or to whose issue] any appointment shall be made, unless he or she bring into distribution or allow for the benefit of such appointment.

—hotchpot; (*Short general form*);

57 w^5. And, on failure by any means of any of the trusts herein declared of any part or parts of my residuary estate in favour of any of my issue by my present wife, I direct such part or parts, and the income therefrom, to be held upon such trusts in favour of my other issue by my present wife as may then be subsisting in respect of any other parts of my residuary estate, and the income therefrom; And, on failure by any means of all the trusts hereinbefore declared in favour of my present wife and my issue by her, I direct the whole of my residuary estate to be held upon the trusts hereinbefore declared concerning part of it in favour of the said [*children by former wife*], and their issue. But, if there should be no issue of mine by my present wife living at my decease, and if my wife should survive me, I direct one moiety of my residuary estate to be transferred unto my wife, her heirs, executors, administrators, and assigns, and the other moiety to be held upon the trusts hereinbefore limited in favour of my said children, [*names*], and their issue, [as if my wife had died in my lifetime]. (*Powers to partition among devisees; to lease, exchange, and partition, &c.* (51 d^2); *Maintenance and advancement,* (59 c)).

—cross limitations among issue by present wife;

—if wife should survive, and there should be no issue by her, then as to one moiety for her, and as to the other for issue by former wife.

57 x. In trust for my wife, if she should survive me, and such child or children of mine as shall survive me and attain the age of twenty-one years or marry, and such issue of any child of mine dead at my decease as shall survive me and attain the age of twenty-one years or marry, if more than one in equal shares, and her, his, or their heirs, executors,

Trust for widow and issue in equal shares, per stirpes.

administrators, and assigns; But so that no child of any grandchild of mine shall be included in this gift if such grandchild survive me; And so that the child or the children collectively of any child or grandchild of mine shall take only such share as his, her, or their parent would have taken if living. (*Power to partition among devisees; to lease, exchange, and partition*, (51 d^2); *Trust for maintenance and advancement*, (59 c)).

To raise £—,

57 y^1. I DIRECT my said trustees or trustee forthwith to raise, out of my personal estate, or, if necessary, by sale or mortgage of any part of my real estate, the sum of £——, with interest thereon after the rate of four per cent. from the time of my decease to the time of raising the same, (such interest when raised to be added as capital to the said sum of £——), and to invest the said sum of £—— and interest upon such securities as aforesaid, (with power from time to time to vary such investments), and to be possessed thereof,

and invest for benefit of [illegitimate] children;

57 y^2. UPON TRUST for my [four] children [by (a) my said wife, [*name*], namely, [*names*]], in equal shares; as to my [said] daughters, for their separate and inalienable use. BUT, if any of my [said] children be now dead or should die in my lifetime, or should afterwards die under the age of twenty-one years, the share intended for each such deceased child shall be held in trust for such his or her child or children living at my decease as shall attain the age of twenty-one years or marry, if more than one in equal shares, and (being a daughter or daughters) for her or their separate and inalienable use; [And, if there be no such issue, upon the trusts herein expressed concerning the other shares of the said sum

—gift over on death under age;

As to provisions for illegitimate children.

(a) [It sometimes happens that a testator wishes to provide for his illegitimate children without disclosing their illegitimacy on the face of his will. The above form is adapted to the case where the testator has separated from his wife, and has children by her who are provided for by the separation deed; the objects of the present disposition being only his children by reputation, (see the provision for the wife, (57 y^2)). If the same name occurs in both the families, some further circumstance must be added for the purpose of identification, as "my wife, [*name*], the daughter of A. B., Esq.," or, "my daughter, [*name*], now of the age of —— years." (See 2 Jarm. on Wills, 146, ante, p. 514). If the provision is for legitimate children, the statement of their number and names will either be omitted or be followed by expressions sufficient to let in future children.]

of £——]. [AND, if any of my said children should die without leaving any issue living at his, her, or their death, then I DIRECT that such share or shares of the said sum of £—— as shall be vested in such child or children free from any gift over hereinbefore contained, and shall not have been by him, her, or them effectually disposed of by will or otherwise, shall, after payment of his or her funeral expenses (*a*) and debts, be disposed of and distributed as if the same were part of my personal estate undisposed of by my will (*b*)].

—gift over on death without issue;

57 *y*[3]. I DIRECT my said trustees or trustee to be seised and possessed of the residue of my real and personal estate, UPON SUCH TRUSTS as my said wife, [*name*], shall, at any time or times, by will or (being unmarried) by deed appoint; AND, subject thereto, UPON TRUST to pay to or permit my said wife, [*name*], to receive the income from such parts of my said residuary estate as shall produce income during her life, for her separate use, and to use and enjoy such parts thereof as shall consist of furniture, linen, plate, china, jewels, trinkets, books, pictures, horses, carriages, or other chattels of a like nature, for her separate use. AND, subject to the trusts aforesaid, my said trustees or trustee shall be seised or possessed of my said residuary estate and the income therefrom, UPON TRUSTS corresponding as nearly as may be with the trusts hereinbefore declared concerning the said sum of £—— and the income therefrom.

—residue of real and personal estate as wife shall appoint;
—subject thereto, for wife for life, and, after her death, for children (by reference to trusts of portions);

57*z*[1]. (*Devise of real estate in trust for wife for life, and then to be sold* (52 *p*) *or* (52 *i*)).—UPON TRUST to pay, transfer, or divide the same [trust-monies, funds, and securities,] unto, between, or among such child or children of mine as shall attain the age of twenty-one years or die under that age leaving issue (*c*), and if more than one in equal shares and proportions. (*Maintenance, &c.* (57 *z*[3])).

(*Real estate directed to be sold after wife's death*). For children attaining twenty-one or leaving issue;

(*a*) [Necessary funeral expenses are not debts of the deceased, although they are to be paid out of *his* assets in priority to all other claims.]

(*b*) [The object of this provision is, of course, to exclude the title of the Crown in case of the death of an illegitimate child without leaving any next of kin.]

(*c*) [Under the above limitation, it is conceived that the 33rd section of the Wills Act would not apply to the case of a child leaving issue surviving the testator, and the form is defective in not providing for such issue. But opinions are divided on the point.]

—for children attaining twenty-one or marrying.

57 z^2. Upon trust to pay, transfer, or divide the same, [trust-monies, funds, and securities,] unto, between, or among such child or children of mine as shall attain the age of twenty-one years, or marry under that age, and if more than one in equal shares and proportions. (*Maintenance, &c.* (59 *c*)).

For the children of a living person (*whether tenant for life or not*) attaining twenty-one or leaving issue, and the children of deceased children;

58 a^1. In trust for such child or children of [*name*], born or in being at any time in his [her] life (*a*), as be living after my decease, and shall attain the age of twenty-one years or leave issue, and such child or children of any child or children of the said [*name*], dying before me, as shall attain the age of twenty-one years or leave issue, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of a deceased child of the said [*name*] shall take only the share which such deceased child would have taken if living.

—shares of girls for their separate [and inalienable] use.

58 a^2. And as to the share or shares of any girl or girls, for her or their separate use, [without power of anticipating or disposing of the income or capital thereof otherwise than by will].

Children of a living person, sons attaining twenty-one or leaving issue, daughters at twenty-one or marriage, and the children of deceased children;

58 *b*. In trust for such child or children of [*name*], born or in being at any time in his lifetime, as shall be living at his decease and shall attain the age of twenty-one years or leave issue, or, being a daughter or daughters, attain that age or marry; and such child or children of any child or children of the said [*name*], dying before me, as shall attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of the said [*name*], shall take only the share which such deceased child would have taken if living; And, as to the share or shares of any girl or girls, for her or their separate use, without power of anticipating or disposing of the income or capital thereof otherwise than by will.

—shares of girls for their separate and inalienable use.

For brothers and sisters for life; the capital for the issue of

58 c^1. In trust for my brothers and sisters, and their respective children or other issue (including the issue of any brothers or sisters of mine [already dead or] who shall be

(*a*) [Where the parent takes an indefeasible life-interest in the entire fund to be distributed among his children, these words are unnecessary; but if there is no such life-interest, they are important.]

dead at my decease leaving issue surviving me), successively, in manner and for the interests hereinafter mentioned, and in equal shares as between or among the respective families, so that each brother or sister of mine, who shall survive me, shall take the income of one share for his or her life; and so that such child or such children collectively of each brother or sister of mine (including deceased brothers and sisters), as shall attain the age of twenty-one years or leave issue, or, being a daughter or daughters, attain that age or marry, together with such child or such children collectively of any nephew or niece of mine (of the same family) dying before me, as shall attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, shall take one share, in equal proportions as between or among brothers and sisters; But so that the child or the children collectively of any deceased nephew or niece shall take only the portion which such deceased nephew or niece would have taken if living.

—brothers and sisters, per stirpes;

58 c^2. PROVIDED ALWAYS, that, in case of failure of such issue as aforesaid of any brother or sister of mine to take under the trusts aforesaid, the share intended for the issue of such brother or sister shall (subject to the life-interest of such brother or sister, if living) be held upon the trusts herein expressed concerning the other shares of the said trust-monies and premises; AND in case there should be no such issue as aforesaid of any brother or sister of mine, then the said trust-monies and premises shall be held IN TRUST for such of my brothers and sisters as shall survive me [and attain the age of twenty-one years, or leave issue, or, being a sister or sisters, attain that age or marry], and if more than one in equal shares.

—cross limitations;

58 c^3. PROVIDED ALSO, that every female taking any interest or share under the foregoing trusts shall take the same for her separate use, and without power to anticipate or dispose of the same otherwise than (in the case of an interest extending beyond her life) by will.

—females to take for separate use.

58 d^1. IN TRUST, as to one ——th part thereof for my brother, [*name*], during his life; and, after his decease, IN TRUST for such child or children of my said brother, [*name*], as shall attain the age of twenty-one years or leave issue, or, being a daughter or daughters, attain that age or marry, and such child or children of any child or children of my said

For brothers and sisters by names, in shares for their lives, and then for their children, with cross limitations; as to one —th,

for brother A. and his children;

brother dying before me as shall attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of my said brother shall take only the share which such deceased child would have taken if living; (*For separate use of girls* (58 *a* [2]), *or insert at the end of the limitations a general declaration that females shall take for their separate use* (58 *c* [3])); And if there should be no such child or grandchild, then Upon the trusts herein declared concerning the other —— ——ths of the said trust-monies and premises; And if all such trusts should fail of effect, then In trust for my said brother, [*name*], absolutely.

—on failure of children, on the trusts of the other shares;

—as to another —th for children of deceased brother at twenty-one, &c.;

58 *d* [2]. And, as to another ——th part of the said trust-monies and premises, In trust for such child or children of my deceased brother, [*name*], as shall survive me and attain the age of twenty-one years or leave issue, or, being a daughter or daughters, attain that age or marry, and such child or children of any child or children of my said brother, [*name*], dead at my decease, as shall survive me and attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age or marry, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of my said brother shall take only such share as such deceased child would have taken if living; (*For separate use of girls* (58 *a* [2]) *unless the form* (58 *c* [3]) *is used*); And if there should be no such child or grandchild of my said deceased brother, then upon the trusts herein declared concerning the other —— ——ths of the said trust-monies and premises.

—if no such child, over;

—as to the remaining —ths for other brothers and sisters by reference;

58 *d* [3]. And, as to each of the remaining ——th parts of the said trust-monies and premises, Upon trusts in favour of each of my other brothers and sisters, [*names*], respectively, and their respective children or grandchildren, similar to the trusts above declared concerning the ——th share limited in favour of my said brother, [*name*], and with the like limitations over of each such share on failure of the original limitation thereof, and with the like ultimate limitation thereof on failure of such limitations over; [But so that each sister of mine shall take her share or interest for her separate use, and without power to anticipate or dispose of the same otherwise than (in the case of an interest extending beyond her life) by will.] (*Or, substitute the general declaration* (58 *c* [3])).

—[for separate use of sisters].

58 e^1. In trust to pay the income therefrom unto, between, or among such of my brothers and sisters as shall survive me, and the issue living at my decease of any of my brothers and sisters who shall then be dead (other than the issue of a child or grandchild then living), during their respective lives, in equal shares as between or among children of the same parent; And so that the issue of any deceased brother or sister, or of any deceased brother's or sister's child or grandchild, shall collectively take only the share which such deceased brother or sister or brother's or sister's child or grandchild, would have taken if living; And after the decease of each such brother or sister or brother's or sister's issue, as to the share whereof the income is so given to him or her for life, Upon such trusts for the benefit of any one or more of his or her issue (born in his or her lifetime), as he or she shall by deed or will appoint; And, subject thereto, In trust for such his or her child or children as shall attain the age of twenty-one years or leave issue, or, being a girl or girls, attain that age, or marry, and if more than one in equal shares.

For surviving brothers and sisters or their issue for life, per stirpes; and then to their children or other issue at twenty-one, &c., per stirpes;

58 e^2. And, on failure of the trusts aforesaid, as to such share upon the trusts herein declared concerning the other shares or share (including this present limitation); And on failure of all the trusts aforesaid, as to such share, Upon trust for the person to whom the income thereof is hereinbefore made payable, his or her executors, administrators, and assigns.

—cross limitations between or among the several families;

58 e^3. Provided always, that no child or other issue of any of my said brothers and sisters, to whom or to whose issue any share or interest shall be appointed under the foregoing power, shall take any benefit under the foregoing trusts in default of appointment, without bringing such appointed share or interest into distribution under the said trusts in default of appointment, or allowing for the same. (*Maintenance, &c.* (59 *c*)).

—hotchpot.

58*f*. In trust for such of the following persons, [*names*], as shall be living at my decease [and shall attain the age of twenty-one years, or die under that age leaving issue], and the children then living and who shall attain the age of twenty-one years, or die under that age leaving issue, of such of the last-named persons as shall die before me, in equal shares; But so that the child or the children collectively of one parent shall take one share only, to be divided equally among them. (*Maintenance, &c.* (59 *c*)).

For several persons by name at twenty-one or marriage, with substitution of children.

For several persons by name, and the children of deceased persons per stirpes, at twenty-one;

58 *g*. In trust for such of the following persons, [*names*], as shall be living at my decease [and shall attain the age of twenty-one years, or die under that age leaving issue], and the child or children then living and who shall attain the age of twenty-one years, or die under that age leaving issue, of such of the last-mentioned persons as shall die before me, and of [*deceased persons*], (respectively deceased), in equal shares; But so that the child or the children collectively of one parent shall take one share only, to be divided equally among them. (*Maintenance, &c.* (59 *c*)).

—substitution of children.

GENERAL DIRECTIONS RESPECTING BEQUESTS.

Maintenance and education of minors. (*General form*);

59 *a*[1]. I authorise my trustees or trustee, in their or his discretion, either to apply towards the maintenance and education of any minor, or to pay for such purpose to the father or (whether the father be living or not (*a*),) to the mother, or to any person acting, (with or without authority), as guardian of any minor, and without being bound to see to the fulfilment of such purpose or to inquire whether the same is or ought to be otherwise provided for, all or any part of the income (not otherwise applicable under my will) to which, or to the share or property producing which, such minor shall be actually or presumptively entitled under or through my will, whether such minor be also entitled to the share or property producing such income or not; And to accumulate and invest any unapplied income, so that accumulations of income derived from any share or property to which such minor shall be actually or presumptively entitled shall be added to the capital fund or property, and follow the destination thereof; and accumulations of income derived from any other source shall be treated as arrears of such income, and be disposable accordingly; But so, nevertheless, that my trustees or trustee may apply, or pay as aforesaid to a parent or guardian, such accumulations towards or for the maintenance or education of any minor or minors for the time being actually or presumptively entitled thereto.

—destination of accumulations;

—accumulations applicable to future maintenance;

(*a*) [It may sometimes be expedient to give the maintenance fund to the mother in the father's lifetime.]

59 a^2. And I authorise my trustees or trustee to call in or convert into money by sale or mortgage, and apply [or pay as aforesaid to a parent or guardian (*a*)] for the benefit and advancement (or, if my trustees or trustee should think it needful, for the maintenance or education) of any person (whether a minor or of full age (*b*),) not more than one-half of any share or property to which such person shall be actually or presumptively entitled under my will; But, while the income therefrom is payable to any other person, not without such person's consent in writing. —advancement.

59 *b*. I authorise my trustees or trustee, in their or his discretion, to apply for the maintenance and education of any minor who for the time being shall be actually or presumptively entitled under my will or any codicil thereto to any legacy or portion, or any share, estate, or interest of or in any personal or real estate, or to pay to any parent or guardian of any such minor for such purpose, all or any part of the income from such legacy, portion, share, estate, or interest, (not being otherwise expressly disposed of by my will); And to raise on any deferred legacy, the income from which shall not be otherwise expressly disposed of by my will, not more than four per cent. interest for maintenance; And to accumulate any unapplied income (other than interest raised under this provision for maintenance, which interest is only to be raised from year to year to the extent to which it may be required); With power to apply such accumulations for the maintenance or education of the person or persons presumptively entitled thereto. (*Advancement* (59 a^2)). General trust for maintenance and advancement, applicable to every legacy and every interest in real or personal estate under the will. (*Short form*).

59 c^1. I authorise my trustees or trustee to apply all or part of the income (not hereby otherwise disposed of) from the [vested or] presumptive share [legacy or property] of any such child [*or*, of any such issue, *or*, of any legatee or devisee under my will], during his or her minority, for his or her maintenance and education; and to invest any unapplied Maintenance. (*Short general form*);

(*a*) [In general the trustees may reasonably be required to see to the application of advancement monies; but particular circumstances may make it expedient to relieve them from that duty.]

(*b*) [The power of advancement should not be confined to minority, where the vesting of the legatee's interest depends on survivorship, or may otherwise be deferred beyond the period of majority.]

income; such surplus income to follow the destination of the capital, but to be applicable if required for the maintenance and education of any minor or minors [actually or] presumptively entitled thereto.

—advancement;

59 *c*[2]. And I authorise my trustees or trustee to apply not more than one-half of any minor's [vested or] presumptive share [legacy or property] for his or her advancement in life.

—authority to pay maintenance money to father, mother, or guardian.

59 *c*[3]. And I authorise my trustees or trustee to pay any monies applicable for the maintenance or education [or advancement] of any minor to the father or (whether the father be living or not) to the mother [or to any person or persons acting (with or without authority) as guardian or guardians] of such minor, without being bound to see to the application thereof, or to take notice whether such maintenance or education is or ought to be otherwise provided for.

(*Another form*).

59 *d*. And I declare, with respect to the application of income [or capital] to the maintenance and education of any minor who may be actually or presumptively entitled to any legacy, property, share, or portion under my will or any codicil thereto, that it shall be lawful for my said trustees or trustee, either themselves or himself to apply the same, or, in their or his discretion, to pay such money to the father, or (whether the father be living or not) to the mother, or to any person or persons acting (with or without authority) as guardian or guardians of such minor, for the purpose of being so applied, without incurring any responsibility in regard to the application of the monies so paid; And that it shall not be incumbent on my said trustees or trustee to ascertain whether the father, if any, of such minor, is of ability to maintain him or her, or whether there is any other fund applicable to such purpose.

Authority to trustees to raise £—— for advancement of son by first wife.

59 *e*. And I authorise my trustees or trustee for the time being, other than my said wife, and notwithstanding her dissent, at any time or times after my decease, to raise and apply not more than £—— for the advancement in life of [*name*], my son by my first wife; [And I exclude my said wife from a voice in this matter, not from any want of confidence in her, but in order to relieve her from any imputation which the exercise of such a discretion could possibly subject her to.]

59*f*. PROVIDED ALWAYS, AND I HEREBY DECLARE, that the trust or direction hereinbefore imposed on my said wife to apply a portion of the gains and profits of trade, or other annual income, for the support and maintenance of my children for the time being, shall not implicate my trustees in any responsibility respecting the application thereof, nor shall the same extend to any son or sons of mine after he or they respectively shall have attained the age of twenty-one years or shall have married, or to any daughter of mine after she shall have married, nor for any longer period than she shall be willing to reside with my said wife, it being my intention merely to provide my daughters with a home, and not to support a separate establishment for them.

Proviso, explanatory of trust for maintenance.

60*a*[1]. I AUTHORISE my trustees or trustee to invest any trust-monies not immediately payable under my will, in the funds or in Exchequer bills, or on mortgage of real or personal property, or in any savings' bank; And to vary any investment of trust-monies, [but, as to investments whereof the income or any aliquot part thereof exceeding one sixth part shall for the time being be payable to any adult person or persons, with the consent in writing of such person or persons, if resident in Great Britain and of sound mind.]

General power to invest and vary investments;

60*a*[2]. ALSO, to invest and accumulate any income from trust-monies or trust-property not immediately applicable in increase of the capital thereof, or, if such income be actually vested in a legatee or devisee for life, for the benefit of such legatee or devisee.

—general power to accumulate surplus income.

60*b*. PROVIDED ALWAYS, AND I HEREBY DIRECT, that the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, shall lay out and invest such share or shares of or in the said residuary trust-monies, funds, and securities, [*or*, such legacy or legacies, share or shares of my residuary estate, and other trust-monies under my will] as shall not for the time being be payable to some person or persons capable of giving a discharge for the same, in the names or name of my said trustees or trustee, in the public stocks or funds of Great Britain, or upon real securities in England or Wales, to be from time to time altered and varied as they or he shall think fit; With power for them or him from time to time to apply the income from any such

Investment of shares of minors &c.;

—maintenance.

trust-monies for the maintenance, education, or benefit of the person or persons presumptively entitled thereto.

If funds for legacies be insufficient, one legacy to bear deficiency, and if insufficient, certain other legacies to abate proportionally;

61 a^1. PROVIDED ALWAYS, AND I HEREBY DIRECT AND DECLARE, that in case the monies to arise by the sale of the real estate hereinbefore by me made saleable, and the stocks, funds, and real securities, of or to which I shall die possessed or entitled as aforesaid, should not, after payment thereout of my funeral and testamentary and trust expenses and debts be sufficient to pay and satisfy the whole of the several legacies and annuites hereinbefore by me directed to be paid thereout (*a*) as aforesaid, then the deficiency shall wholly fall upon and be satisfied out of the legacy of £—— hereinbefore bequeathed to my said children (subject to the power of appointment of my said wife); And in case such deficiency should exceed the amount of the last-mentioned legacy, then I declare that one moiety or half part (being the moiety over which the power of settlement hereinbefore contained does not extend) of the several legacies of £—— a piece hereinbefore bequeathed to my said unmarried daughters, and the said legacy of £—— bequeathed to or in trust for my said daughter, [*married daughter*], and her children, shall respectively abate in proportion to the respective amounts thereof, but the other legacies hereby bequeathed shall be paid in full (*a*).

—certain annuities to be paid in full.

61 a^2. AND I FURTHER DIRECT AND DECLARE, that none of the legacies to my children (included in the last-mentioned class) shall be paid until full and adequate provision shall have been made for the payment of the annuities of £—— and £—— hereinbefore bequeathed.

As to the priority and order of payment of legacies.

(*a*) Where a testator has bequeathed legacies payable at different periods out of a fund of indefinite amount, some of which will become payable before it can be known whether the produce of the fund will be sufficient to pay all the legacies in full, it is convenient to give to the legatees priority according to the prescribed order of payment; otherwise the executors are compelled either to suspend the payment of all the legacies until the net produce of the fund has been ascertained (which seems contrary to the intention), or else to take security from the legatees to refund, which is generally attended with inconvenience and expense.

That ordinary expressions, in a will descriptive of the order of paying pecuniary legacies, are not considered to denote an intention to vary or disturb the equality, which, by the general rule of equity, obtains among legatees of any given class, vide ante, p. 404.

61 *b*. I DIRECT my executors to deliver the consumable stores hereinbefore bequeathed by me to my said wife immediately after my decease, and to deliver and transfer the other absolute specific legacies given and bequeathed by my will to the respective legatees thereof within one calendar month next after my decease, and to pay, retain, or satisfy the several other legacies given and bequeathed by my will and not directed to be paid at any other time, within six calendar months next after my decease (*a*).

Time for delivery and payment of specific and pecuniary legacies.

(*a*) The payment of general pecuniary legacies cannot be enforced until the lapse of a year from the testator's decease, though the executor may, if he think proper, pay them at an earlier period, and, it is conceived, ought to do so, if the adequacy of the estate to the payment of the legacies is unquestionable. The time of payment is not varied by a mere direction to pay as soon as convenient. [As to the commencement of annuities given by will, see p. 470, n. In the case of *Brooke* v. *Lewis*, 6 Mad. 358, a direction to divide a residue among certain persons, or such of them as should be living at the time the same should be distributed, was held to entitle those who were living at the end of a year from the testator's death.]

Rules as to payment of legacies, and their carrying interest.

The general doctrine is, that legacies carry interest only from the period when they become payable, (*Wood* v. *Penoyre*, 13 Ves. 333; *Pearson* v. *Pearson*, 1 Sch. & Lef. 10), and one of the purposes for which payment is directed to be made at an early period (commonly three or six months) after the testator's decease, usually is to accelerate the legatee's claim to interest, though of course a legacy may, by express declaration, be made to carry interest before the time of payment. [But a direction to pay "as soon as possible" does not exclude the application of the general rule: *Webster* v. *Hale*, 8 Ves. 410; *Benson* v. *Maude*, 6 Mad. 15.]

[The reason for postponing the payment of legacies, and consequently for not giving interest on them during the first year from the testator's death, being the necessity for giving time to realise and ascertain the claims on the residue, does not apply to legacies charged primarily on real estate, and such legacies therefore bear interest from the testator's death: *Maxwell* v. *Wettenhall*, 2 P. Wms. 26; *Spurway* v. *Glynn*, 9 Ves. 483; *Shirt* v. *Westby*, 16 Ves. 393. And the alteration in the law by which real estate is made assets for payment of debts, does not, it is conceived, furnish a reason for altering the rule, which is not founded on the liability of the residue to debts, but on the presumption that it is not producing income. Hence, it is conceived, that if a specific bequest is made of a particular fund charged with legacies, such legacies will carry interest from the testator's death. But where the demonstrative fund is itself a general legacy, interest is allowed only from the end of the year: *Lord Hertford* v. *Lord Lowther*, 9 Beav. 266.]

The rule which postpones a legatee's title to interest until the end of a year, or any other prescribed period of payment, admits of an

Time of paying legacies.

61 *c.* And I direct, that all the legacies bequeathed by my will or any codicil thereto, of which no time of payment or

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exception in regard to legacies bequeathed [in satisfaction of debts: *Clarke* v. *Sewell*, 3 Atk. 99, or] by way of portion by a parent to an infant child, who may in general claim interest from the day of the testator's decease as a fund for maintenance. [And so, where interest on a deferred legacy is expressly given for the maintenance of an infant not related to the testator, it commences from the testator's death: *Newman* v. *Bateson*, 3 Swanst. 689; *Dowling* v. *Tyrell*, 2 Russ. & M. 343. And see *Boddy* v. *Dawes*, 1 Kee. 362; *Pickwick* v. *Gibbes*, 1 Beav. 271. But, generally, a deferred legacy with interest in the meantime carries interest only from the end of the year: *Knight* v. *Knight*, 2 Sim. & Stu. 492.] Even in other cases, however, it is often found convenient to fix an earlier time of payment than is prescribed by the general rule, as the delay of a year presses rather hardly upon a legatee, whose income is to be derived principally or solely from the bequeathed fund. This is especially felt where the legacy is directed to be invested in trust for a person for life; the legacy is not payable to, or rather is not demandable by, the trustee until the end of a year, and if, at that time, the half-yearly dividend (assuming the investment to be made in stock) had just accrued, the cestui que trust for life would have to wait for nearly six months longer before another dividend would be receivable; so that there would be an aggregate interval of nearly eighteen months between the death of the testator and the legatee's actual usufructuary enjoyment*. Hence the expediency in such cases of accelerating the period of payment, or (which would be preferable where early payment might be inconvenient to the estate) of making the legacy carry interest from the period of the testator's decease, or from some early day afterwards.

The preceding remarks, in reference to pecuniary legacies, apply with equal force to general legacies of stock in the public funds, the legatees of which are, under the ordinary rule, entitled to call for a transfer at the end of a year from the testator's death; and, if the transfer is longer delayed, they are entitled to a sum equal to the dividends accruing from that time. Under *specific* gifts of stock, or of any other species of property, real or personal, the devisee or legatee takes all the income accruing from the subject of gift subsequently to the testator's decease: [*Barrington* v. *Tristram*, 6 Ves. 345; *Bristow* v. *Bristow*, 5 Beav. 289.]

Specific legacies.

Where it is not (and it rarely is) intended that a legacy of stock shall be specific, care should be taken to avoid describing the stock bequeathed as belonging to the testator, or as standing in his name. The legacy should be simply of so much stock, and then it may be satisfied by a transfer of that amount of stock, from whatever source obtained, being in fact undistinguishable from a legacy of a specified amount of money. See further on this subject Hayes's and Jarman's Concise Forms of Wills, 194, n., 3rd ed.

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* But the current dividend, in the event of the death of the cestui que trust for life, would now be apportioned under the stat. 4 & 5 Will. 4, c. 22, s. 2, ante, Vol. 4, p. 343.

delivery is specified, shall be paid and delivered within six calendar months after my decease, or earlier if convenient.

61 *d.* I DIRECT, that the legacies hereinbefore given to [*legatees*], respectively, shall be paid in priority to any other pecuniary legacy, [*or*, legacy, whether pecuniary, demonstrative, or specific (*a*)], given by my will. Priorities of legacies.

61 *e.* AND I DIRECT AND DECLARE, that the several pecuniary legacies, classes of legacies, and sums of money by me given and directed to be paid, as aforesaid, shall have priority and be discharged in the numerical order and course in which the same are respectively given as aforesaid, the legacies to my children and executors respectively being considered as of equal degree among themselves. Legacies to be discharged according to their numerical order.

62 *a.* I DIRECT, that no legacy or gift contained in my will shall (unless a contrary intention is expressed) be taken to be in satisfaction of any debt owing by me. AND if any legatee be now dead, or die before me, I GIVE the legacy intended for him or her to his or her executors or administrators, to be applied as if the same had formed part of the personal estate of such legatee at his or her decease. Legacies not to be in satisfaction of debts; —general provision against lapse.

62 *b.* AND I DECLARE, that no legatee under my will or any codicil thereto shall be entitled to receive his or her legacy (of whatever nature the same may be), until he or she shall have first paid to my executors all monies owing from such legatee to me; and that no legacy hereby given to any female, who shall be married at my decease or before the same is paid or transferred, shall be payable or transferable in case her husband, or his representative in the event of his decease, should stand indebted to me or my estate, until such debt or debts shall be paid by such husband or his representative; And that, where any legacy is directed to go to the children of any legatee in case of his or her death in my lifetime, such children shall take subject to first paying all debts due and owing to me from the parent or parents of such children. Provision where legatee or legatee's husband or parent is indebted to testator.

63 *a.* AND I HEREBY DECLARE, that the legacy duty pay- Legacy duty to

(*a*) [Specific legacies are not liable to contribution, for the benefit of pecuniary legatees, without an express declaration.]

be paid out of residue;

—charge of legacies on realty.

able for the several annuities and legacies given by my will or any codicil thereto, as well specific as pecuniary, and as well for any limited interest as absolutely, shall be paid out of the residue of my personal estate and effects; And that, in case the residue of the monies to arise from my said personal estate and effects should be insufficient for the payment of the same annuities and legacies and the duty thereon, the deficiency shall be a charge upon and payable out of the monies to arise from the sale of my said real estate.

63 *b*. I DIRECT all the annuities and legacies given by my will or any codicil thereto to be paid free of legacy duty.

63 *c*. AND I DIRECT, that the legacy duty payable on the said sum of £—— Consolidated Three Pounds per Centum Annuities hereinbefore bequeathed shall be paid out of my residuary personal estate.

Legacy duty on life interests to be paid out of residue.

63 *d*. I DIRECT that the legacy duty on the rent-charges, annuities, and life interests, given by will or any codicil thereto, shall be paid out of my residuary personal estate.

Fund for legacy duty.

63 *e*. I DIRECT that the legacy duty on every annuity and legacy, as well specific as pecuniary, and on every share of residue given by my will, whether absolutely or for any limited interest, shall be paid by the said [*name*] out of such property as is hereby given to him [*or*, out of the one-tenth part of my residuary estate hereby given to [*name*] (*a*)].

Advancements to children or grandchildren to be deducted from their shares.

64 *a*. PROVIDED ALSO, AND I HEREBY DECLARE AND DIRECT, that, in case I should in my lifetime give, advance, or settle, unto, for, or upon any of my children or grandchildren respectively, any sum or sums of money or other property for the putting or placing him, her, or them in or to any profession, trade, or business, or for or towards his, her, or their

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As to providing a fund for payment of legacy.

(*a*) [When the legacy duty is directed to be paid out of a specific fund, so much of the fund as is required for payment of the duty on other parts of the personal estate is exempt from duty: (Stat. 36 Geo. 3, c. 52, s. 21, ante, Vol. 9, pp. 749, 826). Where the will is made in favour of strangers or distant relatives, an important saving may be thus effected by appropriating a specific fund for payment of the legacy duty on the residue; and of course a direction for payment of the duty on pecuniary legacies out of the residue, or out of a specific fund, effects a proportionate saving. As to the propriety of exempting annuitants and legatees for life from legacy duty, vide ante, p. 468, n. (*b*).]

marriage portion, or otherwise for or towards his, her, or their advancement in the world, and such sum or sums or other property should be entered in any of my books of account by way of debit, then such sum or sums of money, or the value of such property so to be advanced for, or received by, or given to, or settled upon any such children or grandchildren respectively, shall, if less than the portion or share or portions or shares hereby given and provided for such children or grandchildren respectively, be accounted, deemed, and taken as and for part of such portion or share or portions or shares respectively, but if equal to or more than such portion or share or portions or shares respectively, then shall be deemed and taken as and for the whole of such portion or share or portions or shares respectively, unless I should, by writing under my hand, signify and declare the contrary (*a*).

64 *b*. PROVIDED, that money, land, or other property advanced or settled by me in my lifetime, to or for the benefit of any child or grandchild of mine, shall be reckoned as if the same were part of my residuary estate, and as a satisfaction to that extent of the portion or portions hereby given to such child, or his or her issue, or such grandchild, unless I shall have otherwise declared by writing under my hand (*a*).

Advancements in testator's lifetime to be deducted.

64 *c*. I DIRECT, that such sums of money as I have or shall have applied for the benefit of any of my children or grandchildren (*b*), to the amount at any one time of £—— or more,

Advancements in testator's lifetime to be brought into account.

(*a*) [See note (*a*), p. 779.]

(*b*) [The doctrine of satisfaction or ademption of legacies by advancement in the lifetime of the testator (*Ex parte Pye*, 18 Ves. 140; *Suisse* v. *Lowther*, 2 Hare, 43; *Durham* v. *Wharton*, 10 Bligh, 526) does not of course apply to advancements made prior to the will, nor to shares of a *residue;* for a gift of a residue, or a share of a residue, is not considered as a portion: (*Freemantle* v. *Bankes*, 5 Ves. 85. But a bequest of residue may be a satisfaction of a portion secured by settlement: *Thynne* v. *Glengall*, 12 Jur. 805. See *Barret* v. *Beckford*, 1 Ves. sen. 519). Nor does the doctrine apply, unless the testator is either the parent of the legatee, or has placed himself, or manifested an intention to place himself in loco parentis, an intention which may be gathered from the will or from extrinsic evidence, and that notwithstanding the father of the legatee is living: (*Powys* v. *Mansfield*, 3 Myl. & Cr. 359; *Pym* v. *Lockyer*, 5 Myl. & Cr. 29; *Rogers* v. *Soutten*, 2 Kee. 598; *Twining* v. *Powell*, 2 Coll. 262). Advancements of less amount than the legacy are considered to be in satisfaction pro tanto only: *Pym* v. *Lockyer;* *Kirk* v. *Eddowes*, 3 Hare, 509.]

Ademption of portions.

shall be taken in part satisfaction of the legacies hereby provided for him, her, or them; [And in case such advancements to any legatee should exceed the amount of his or her legacy, the surplus shall be brought into distribution by such legatee with my residuary estate, before he or she shall be entitled to share therein.]

Advancement not to be in satisfaction of portions.

64 *d.* I DECLARE, that such advancements as I may make to any of my children [*or*, said nephews and nieces] shall be in addition to and not in satisfaction of any legacy or legacies, portion or portions, or other benefit given to him, her, or them by my will.

Advancements to children in testator's lifetime to be deducted from the respective shares of residue.

64 *e.* PROVIDED ALWAYS, that such monies as I have or shall have advanced to any of my said children, or as shall be owing to me from any of them at my decease, shall be considered as part of my residuary estate, and shall be deducted from his, her, or their share or respective shares; But so, nevertheless, that no such child shall be called upon to refund such monies for investment upon the trusts of my will. PROVIDED ALWAYS, that, if the monies so to be owing to me from any of my children should, alone or together with any advancements made by me to him or her, exceed in amount one equal [ninth] part of my total residuary estate, (including such advancements and debts), then the excess thereof beyond such equal [ninth] part shall be paid to my trustees or trustee, for the benefit of my other children and their issue, (if entitled thereto), in manner aforesaid. [AND, for the information of my trustees, I DECLARE, that I have, up to the —— day of ——, made to or for the benefit of my children advancements (being gifts and not loans) to the amounts or values hereinafter mentioned: namely,—To my son, [*name*], £——; To my son, &c.; AND that the above-mentioned sums are the only advancements made by me to any of my children before the said —— day of ——.]

Advancements to be taken as part of children's legacies, except as to legacy to married daughter.

64 *f.* PROVIDED ALSO, AND I HEREBY DECLARE, that, if any sum or sums of money shall have been advanced by me previously to my decease to any of my daughters as a marriage portion, or any sums of money shall have been advanced by me to any of my sons, and an entry or entries of the last-mentioned monies shall be found in my private books of account, called ——, under the titles of their names respec-

tively, and denominated legacy account, such sum or sums so advanced (whether to daughters or sons) shall be deemed part or parts of the legacy or legacies given to him, her, or them respectively by this my will, save and except as to the said legacy of £—— hereby given upon trust for the benefit of my said daughter, [*married daughter*], and which I direct shall not be subject to any reduction or diminution in respect of any advancement to her (*a*).

Direction as to lapse of charges on lands;

65 *a*. I DECLARE, that, in case any annuity or legacy herein directed to be paid out of any real estate, or any charge upon or limited interest in any real estate hereinbefore created or limited, should fail by being void or by lapse or by any other means, such failure shall be for the benefit of the person or persons to whom such real estate is herein given, subject to such charge or limited interest. AND (*add* (65 *b*)).

Direction as to lapsed shares of residue, &c. (*b*).

65 *b*. I DECLARE, that every part or share of, or interest in, or charge upon, any real or personal property within my testamentary power, whether residuary or otherwise, which would but for this provision be undisposed of by my will, shall be disposed of in such manner in all respects as is herein directed concerning such part or parts of or share or shares in my residuary personal estate as I have hereinbefore effectually disposed of, and in augmentation of such parts or shares in proportion to their respective amounts (*c*).

Lapse to be for benefit of devisee.

65 *c*. AND, in case the trusts hereinbefore declared concerning the sum of £——, to be raised out of my said hereditaments at ——, should wholly or partially fail, I DIRECT that such failure shall be for the benefit of the person or persons who shall be entitled to the same hereditaments.

(*a*) [The book here referred to, being unexecuted and unattested as a testamentary instrument, would not now have any peculiar authority or weight as evidence in consequence of this reference to it.]

(*b*) [For provisions as to lapse of pecuniary legacies, see pp. 506, 509.]

(*c*) [If the residuary gift is properly framed, this clause (which is in the nature of a limitation of cross remainders) will be superfluous. But it may be resorted to, where, on account of the novelty or complexity of the residuary limitations, there is any ground for apprehension of an intestacy as to part of the residue.]

Recital that two of testator's children are supposed to be illegitimate;

66. And whereas the marriage ceremony between me and my said wife was twice performed, namely, once in the parish church of ——, on the —— day of ——, and once in the parish church of ——, on the —— day of ——; And whereas the second of the said marriages was solemnized in consequence of some doubts having been raised respecting the validity of our previous marriage, by reason of an irregularity in the license in pursuance of which the same was solemnized; And whereas two of my children, namely, [*name*] and [*name*], were born in the interval between the performance of the said two marriage ceremonies: Now I hereby direct and declare, that all the gifts, trusts, and legacies in this my will contained and declared unto and in favour of my children, shall extend to and comprise the said [*two children*], although they may happen or prove, in contemplation of law, to be illegitimate by reason of the circumstances aforesaid, or from any other cause whatsoever (*a*), it being my intention that such gifts, trusts, and legacies shall have the same operation and effect, to all intents and purposes whatsoever, in regard to each and every child and reputed child of me and my said wife, as the same would have had if the first marriage or intended marriage between us had been duly and regularly solemnized, any rule of construction to the contrary notwithstanding.

—direction that they shall participate in the benefits given by the will to children.

Recital that testator holds the advowson to a rectory;

67. And whereas I hold the advowson of the rectory of ——: Now, if I should have presented any son of mine to the said living and such son should survive me, I direct that he shall give up out of the share of my residuary estate to which, but for this direction, he would be entitled, the sum of £——, to go in augmentation of the other shares of my residuary estate, and be divisible and applicable in the manner hereinbefore directed concerning such shares. And if no son of mine should be incumbent of the said rectory at my decease, I authorise my said trustees or trustee to postpone the sale of the said advowson, and in their or his discretion to present any son of mine to the said living; And in case they or he should retain the said advowson for such purpose, they or he shall also suspend the payment out of the expectant or

—if he should have presented a son to the living, son to give up £—— out of the residuary estate;

—if no son of testator be incumbent at his death, trustees may delay sale of advowson for the purpose of presenting a son,

—and retain

(*a*) [As to devises to illegitimate children, vide ante, pp. 341, 348, 514.]

vested share of any son, or out of the expectant or vested shares of any sons of mine whom or one of whom they or he shall propose to present to the said living, the sum of £——, in order that after any such son shall be presented to the said living the same sum may be applied in augmentation of the remaining portion of my residuary estate; But the income from the money or fund so retained shall be applicable for the maintenance, education, and benefit of such son or sons in the meantime. (*See other provisions, post, p.* 800.)

£—— out of any son's share of residue, to be distributed among the other children when he is presented.

DEVISE OF TRUST ESTATES.

68 *a*. I GIVE AND DEVISE unto the said [*trustees*], all such real estates as are now vested in me as mortgagee or trustee, To HOLD the same unto and to the use of the said [*trustees*], their heirs and assigns, for ever, or for all my estate and interest therein, subject nevertheless to the equities affecting the same respectively, and to the intent that such of the trusts and purposes affecting the said trust-premises as at the time of my decease shall be subsisting may be carried into effect.

Devise of estates held in mortgage or trust;

68 *b*. AND I EMPOWER my said wife, by any deed or deeds, to be attested by one witness or more, to limit and appoint all and every or any the freehold or copyhold hereditaments vested in me as mortgagee or trustee to such uses, for such estates, and in such manner, as she shall think proper. AND, subject thereto, I DEVISE to her my said wife all the said freehold and copyhold hereditaments vested in me as mortgagee or trustee, To HOLD the same unto and to the use of my said wife, her heirs and assigns, for ever, subject nevertheless to such equities and trusts as for the time being shall or may affect the same hereditaments respectively.

Power of appointment;

— trust and mortgage estates to wife.

68 *c*. I DEVISE all estates vested in me as trustee or mortgagee, To SUCH USES as my said trustees or trustee for the time being shall, before the expiration of twenty-one years from the death of the survivor of the persons named in my will, by deed appoint; And, subject thereto (except as to copyholds and customary hereditaments), To THE USE of the said [*trustees*], their heirs and assigns, for the estates which I

Devise of mortgage trust and estates, with power to appoint.

have therein, upon the trusts to which the same are subject(*a*).

As to devising trust estates.

(*a*) [Express devises of trust estates are of modern origin. They were formerly omitted by inadvertence; but some practitioners, at the present day, designedly exclude such devises from their drafts, apprehending that the testator's estate might be answerable for the defaults of his devisees, as he would have been answerable for the consequences of conveying the estate in his lifetime to any person not duly appointed to the office of trustee. And this notion has received some sanction from recent decisions, though it seems to be founded on an erroneous view of the positions of the trustee and his heir. A trustee by implication only, or who has not accepted an express trust, may at any time transfer the trust estate, and with it his liability, to another, provided he has no notice of any intended fraud. The heir of an express trustee is in this situation. He is not the person trusted, and though he cannot disclaim the legal estate which the law casts upon him, he does not, by merely conveying it away, ~~except~~ the burthen of the trusts, or render himself liable for the performance of them. A trustee who has accepted the office cannot, without authority, discharge himself from it, by parting with the legal estate; but his office and his liability expire with his life; and he is then justified in disposing of the legal estate in such a manner as may promise to be most beneficial to the cestuis que trust. A different doctrine, however, was laid down in the case of *Cooke* v. *Crawford*, 13 Sim. 91, where a testator had devised real estates to three trustees "upon trust, that they his said trustees, or the survivors or survivor of them, or the *heirs* of such survivor," should, as soon as convenient after his decease, but at their discretion, sell the same; and he authorised his said trustees and their heirs to execute all necessary conveyances, and declared that the receipts of the said trustees, or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, should be sufficient discharges. He afterwards declared that the said trustees, their heirs, executors, administrators, and assigns, should hold the proceeds of his real and personal estate upon certain trusts; and he appointed his trustees executors of his will. Two of the trustees renounced the devise; the third, who was also the testator's heir, devised all his trust estates to two persons, who in pursuance, as they supposed, of the power in the original will, sold the estates. The Vice-Chancellor of England allowed a demurrer to a bill filed by them for specific performance against a purchaser, on the ground that they were not the persons to execute the trusts. "I have always understood, ever since the point was decided in *Hawkins* v. *Kemp* (3 East, 410), or rather was, as the judges said in that case, properly abandoned by the defendant's counsel, as not being capable of being contended for, that when two or more persons are appointed trustees, and all of them except one renounce, the trust may be executed by that one. That decision, if it may be so called, has been approved of by Lord Eldon and other judges." After observing on the omission of the word "assigns" in the trust, his Honor said, that, when "the sole trustee thought fit to

Cooke v. *Crawford.*

68 *d.* I GIVE AND DEVISE unto the said [*trustees*], their heirs and assigns, all the freehold and copyhold hereditaments

Devise of estates vested in testator as mortgagee.

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devise the legal estate which was vested in him, he did an act which he was not authorised to do. And here I must enter my protest against the proposition which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is, that it is not beneficial to the testator's estate that he should be allowed to dispose of it to whomsoever he may think proper, nor is it lawful for him to make any disposition of it. He ought to permit it to descend; for in so doing he acts in accordance with the devise made to him. If he devises the estate, I am inclined to think that the Court, if it were urged so to do, would order the costs of getting the legal estate out of the devisee to be borne by the assets of the trustee, [surely not more than the excess, *if any*, of such costs over the costs of getting the estate out of an infant or disclaiming heir]. I see no substantial distinction between a conveyance by act inter vivos and a devise, for the latter is nothing but a post mortem conveyance; and if the one is unlawful the other must be unlawful." His Honor added, that his decision in *Bradford* v. *Belfield*, 2 Sim. 264, being acquiesced in, the question was concluded, or if not decided by that case, was settled by the case of *Townsend* v. *Wilson*, 1 B. & Al. 608. See some strictures on this case in 2 Jarman on Wills, p. 714; and as to the cases of *Townsend* v. *Wilson*, and *Bradford* v. *Belfield*, see *Jones* v. *Price*, 11 Sim. 557. As the power was not given to be exercised by the *assigns* of the surviving trustee, the Vice-Chancellor's observations upon devises by a trustee under trusts in which assigns are named were extrajudicial. In the case of *The Midland Counties Railway Company* v. *Westcomb*, 11 Sim. 57, land contracted to be sold to a railway company had descended to the vendor's infant heir; and the costs of a suit instituted by the company, for the purpose of obtaining a conveyance from the heir, were directed to be paid out of the purchase-money, notwithstanding a provision in the act of Parliament, that all the expenses of conveying lands taken by the company were to be paid by them. The Vice-Chancellor said, that, if the vendor, instead of allowing the land to descend to the infant, had taken the ordinary precaution of devising it either to his executors or to a trustee, in trust to convey to the plaintiffs, there would have been no occasion for the suit. See *Prytharch* v. *Havard*, 6 Sim. 9, where the same rule was applied in the ordinary case of a sale to a private person. But, under similar circumstances, in *Hanson* v. *Lake*, 2 You. & Coll. C. C. 328, no costs were given on either side, and the Court thought, that, in the case in 11 Sim. 57, there must have been some default.]

Midland Counties Railway Company v. *Westcomb.*

[In the case of *Titley* v. *Wolstenholme*, 7 Beav. 425, a testator gave real and personal estate to trustees, their heirs, executors, administrators, and assigns; and the devise was declared to be, as to a certain estate, upon trust that the said trustees and the survivors or survivor of them, his or her heirs or assigns, should pay the rents to R. for life, &c. And the expression, "the said trustees, and the survivors or survivor of them, his or her heirs and assigns," occurred in the receipt

Titley v. *Wolstenholme.*

Force of the word "assigns" in a trust.

vested in me as mortgagee for my own benefit, and of which the right or equity of redemption shall be subsisting at the

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clause and was repeated in several parts of the will. In directing the application of the produce of the real and personal estate when sold, the executors and administrators only of the survivor were mentioned. The will contained no power of appointing new trustees. It was held, in a suit expressly instituted for the purpose of raising the question, that a devise and bequest of the trust estates by the surviving trustee to W. was valid, and enabled W. to perform the trusts of the original will. Lord Langdale, M. R., said, that the present case was distinguishable from the case of *Townsend* v. *Wilson*, which decided that a power of sale reserved to three persons and their heirs was not well executed by two survivors; that, in the various expressions made use of by the first testator, he had referred to the parties to whom he had previously given his real and personal estates, and that there was no question as to the trustworthiness of the devisees; and it could not be supposed that any personal confidence was intended to be placed by the testator in the heir of the survivor of the trustees, because it could not be known beforehand whether there would be any heir; or, if so, he might be lunatic, infant, or bankrupt, and, as such, an improper person to act as a trustee; that there must be a devolution of the estate on some person, either the hæres natus or the hæres factus; and, in construing the will, respect must be had to every word used by the testator.]

[It will be observed, that the above decision, though it certainly does not countenance, is yet not inconsistent with, the doctrine of the Vice-Chancellor,—that a discretionary trust, not expressly given to be exercised by assigns, cannot be exercised by devisees; and so the question remains. But in, perhaps, the majority of cases, the word "assigns" does occur, and then the propriety of devising the trust estate would seem to be unquestionable. (See *Whitfield* v. *How*, 2 Show. 57). However, in the subsequent case of *Mortimer* v. *Ireland*, 6 Hare, 196, where two persons had been appointed executors and trustees, without any words conferring authority on their executors, administrators, or assigns, it was held that the surviving trustee did not, by bequeathing the trust-property to one of his executors, constitute him a trustee under the original will, but that a suit was necessary for the appointment of a new trustee; and this decision was affirmed by the Lord Chancellor. (See also *Fordyce* v. *Bridges*, 2 Phill. 497). But even in cases where, according to these authorities, the testator is unable to authorise his devisee to execute the trusts, a devise of the trust property may be a means of saving expense, if the heir be incompetent and all the cestuis que trust competent; and can in no event, if all parties are properly advised, cause any inconvenience that may not be remedied by a conveyance from the devisees. Instead of a devise to the intended trustees, they might be invested with a mere power of appointment; but, in that case, without the aid of a more liberal principle of construction than that adopted in *Cooke* v. *Crawford*, they could not be regarded as "assigns" within the terms of the trust. To a power *superadded* to a devise this objection would not apply; but in

time of my decease (*a*), To HOLD the same (subject to such equity of redemption) unto and to the use of the said [*trustees*], their heirs and assigns, UPON TRUST to transfer, convey, and assure or otherwise deal with the same, and apply and dispose of the monies arising therefrom, in such manner as shall be requisite and proper for the purpose of getting in such monies and carrying into effect the trusts and purposes of this my will.

68 *e* [1]. AND WHEREAS, by an indenture of grant, bearing date on or about the —— day of ——, and made between &c., in

Recital of conveyance to testator, and that

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the case of copyholds it is often desirable not to vest the legal estate in a plurality of trustees. Vide ante, p. 604. Considering the difficulty (amounting in ordinary practice to impossibility) of successfully discriminating between cases which might fall within the doctrine of *Cooke* v. *Crawford*, and *Mortimer* v. *Ireland*, and those which would be unaffected by it, and the advantage, that, in the majority of cases, is derivable from a devise of trust estates, the better course seems to be, in all ordinary cases, to devise them.]

Remark upon devises of estates vested in a testator as mortgagee.

(*a*) In strictness, devises of estates vested in a testator as mortgagee should be restricted to those of which the right or the equity of redemption shall be subsisting at his death ; for it is obvious that such devises are not intended to comprise estates which become irredeemable in the testator's lifetime. Unless the devise is restricted as in the text, the *legal* estate in property of this description would clearly pass by it, notwithstanding the testator's acquisition, by foreclosure, long possession, or otherwise, of the equitable title. [This may be doubted since the recent Statute of Limitations, which not only bars the remedy after a sufficient lapse of time, but extinguishes the title of the dispossessed owner. When such extinguishment happens, the estate ceases to be held by the mortgagee *as mortgagee*.]

The term "securities for money," occurring in the residuary clause, would, according to modern decisions, carry the legal estate in mortgages, (*Mather* v. *Thomas*, 3 M. & Sc. 648) ; but it is in general better to insert an express devise of estates held in trust and mortgage, than to rely on any such rule of construction, especially where the residuary gift is in favour of children generally, who, even if all adult, might be too numerous to be conveniently made parties to the re-conveyances and transfers of mortgages ; and, being tenants in common, there would be also the danger of the legal estate, in some of the aliquot shares, devolving, by the event of death, to infants, which is effectually guarded against by making the co-devisees joint tenants, among whom the estate would survive.

This consideration suggests the advantage of vesting trust and mortgage estates in several persons, rather than in a single individual. It is usual and convenient to devise the legal estate in mortgages to the persons who, as executors, will be authorised to receive the monies.

the same was made to him as trustee;

consideration of the sum of £—— expressed to be paid by me to the said [*vendor*], the said [*vendor*] did convey and assure unto me ALL THAT [*parcels*], TO HOLD the same unto and to the use of me, my heirs and assigns for ever: AND WHEREAS the said sum of £——, the purchase-money mentioned in the said indenture, was the proper money of [*devisee*], of &c., and I was concerned in the said conveyance or purchase merely as a trustee for and on behalf of the said [*devisee*], but no declaration of trust or conveyance has been made or executed by me touching the premises;

—devise of estate so conveyed to the person beneficially entitled, to uses for preventing dower;

NOW, I HEREBY GIVE AND DEVISE all and singular the hereditaments and premises comprised in the hereinbefore mentioned indentures, with the appurtenances to the same belonging, to the uses following, (that is to say), TO SUCH USES, for such estates, and to and for such intents and purposes, and in such manner and form, as the said [*devisee*] by any deed or deeds shall appoint; And in default of and subject to any such appointment, TO THE USE of the said [*devisee*] and his assigns during his life; And after the determination of that estate by any means, TO THE USE of [*dower trustee*], his executors or administrators during the natural life of the said [*devisee*], IN TRUST for him and his assigns; And after the determination of the last-mentioned estate, TO THE USE of the said [*devisee*], his heirs and assigns for ever (*a*).

—devise of other trust estates to son.

68 *e*[2]. AND I GIVE AND DEVISE all other the freehold and copyhold hereditaments whatsoever and wheresoever which are vested in me as trustee, whether by conveyance, devise, descent, survivorship, or otherwise, TO SUCH USES as my said son, [*name*], [*or*, trustees or trustee for the time being] shall [at any time or times before the expiration of twenty-one years from the death of the survivor of my trustees herein named] by deed appoint; And, subject thereto, UNTO AND TO THE USE of my said son, [*name*], his heirs and assigns for ever, [*or*, my said trustees herein named, their heirs and assigns for ever], or for all my estate and interest therein, subject never-

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(*a*) This devise exemplifies a suggestion, ante, p. 280. Sometimes it is advisable not to allow the trust to appear. In regard to leasehold property and any other species of personalty, the disclosure of the trust is useful in facilitating the claim of the legatee to take the property exempt from legacy-duty. Probably, however, the commissioners would require, for this purpose, evidence of the trust, beyond the testator's own acknowledgment.

theless to the trusts and equities which for the time being may affect the same premises respectively.

68*f*. WHEREAS I am the only surviving trustee and executor of the last will and testament of [*deceased testator*], late of ——, and, as such sole surviving trustee and executor, am seised and possessed of certain freehold, copyhold, and leasehold estates and hereditaments, upon the trusts and for the intents and purposes therein expressed concerning the same; AND WHEREAS I conceive that it will be advantageous to and agreeable to the wishes of the persons beneficially interested in the last-mentioned estates and hereditaments, that the trusts of the said will which remain to be performed shall be executed and carried into effect by [*devisees*], of &c. Now, THEREFORE, I HEREBY GIVE, DEVISE, AND BEQUEATH the freehold, copyhold, and leasehold estates and hereditaments vested in me as such surviving trustee and executor of the will of the said [*deceased testator*], as aforesaid, or in either of such characters, and every part thereof respectively, unto and to the use of the said [*devisees*], their heirs, executors, and administrators respectively, according to the nature and quality thereof, UPON TRUST that they the said [*devisees*], or the survivor of them, or the heirs, executors, or administrators of such survivor, will and shall, in all respects, fully and faithfully perform, fulfil, and execute the several trusts, duties, powers, and authorities which in and by the hereinbefore-recited will were vested in and confided to me jointly with [*deceased trustee*], of &c., my late co-trustee, or such and so many of the same trusts, duties, powers, and authorities as shall, at the time of my decease, happen to be subsisting or capable of taking effect. AND I hereby constitute and appoint the said [*devisees*], executors of my will, so far as respects or concerns the estates and property vested in me as surviving trustee or executor of the will of the said [*deceased testator*], deceased, but no further or otherwise (*a*).

Recital that testator is surviving trustee, &c.;

—devise and bequest of trust estate.

(*a*) The scheme, exemplified in this form, of a trustee transferring by his will the trust estates to persons specially selected for the purpose of carrying on the trusts affecting such estates, may often be adopted with great convenience and advantage. By the combined operation of the devise, and the appointment of executors quoad this particular property, the legal title to the real and personal estates in question will be ab-

As to devises of trust estates.

Special devise, and executorship limited to trust property under the will of A. B.; (*Short form*).

68 *g*. I DEVISE AND BEQUEATH all the real and personal estates and property whereof I shall be seised or possessed at my decease as surviving trustee under the will of [*name*], as to freehold and copyhold hereditaments, To SUCH USES as [*special trustees*], of &c., or the survivors or survivor of them, or the executors or administrators of such survivor, shall, at any time or times before the expiration of twenty-one years from the death of such survivor, by deed appoint; AND, subject thereto, and as to all the said real and personal trust property, UNTO AND TO THE USE of the said [*special trustees*], their heirs, executors, administrators, and assigns respectively, upon the trusts to which the same may be subject. AND I APPOINT the said [*special trustees*] to be my executors, so far only as concerns the personal property whereof or whereto I may be possessed or entitled as such surviving trustee under the will of the said [*name*] as aforesaid.

Recital that testator is possessed of trust-funds as surviving trustee under a settlement;

68 *h*. WHEREAS I am now possessed of the sum of £——, Consolidated Three Pounds per Centum Bank Annuities, standing in the books of the Bank of England in the joint names of my self and [*names*], respectively deceased, and also of a certain bond or obligation for the sum of £——,

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solutely vested in the testator's nominees, [although, according to recent decisions, they may not therewith succeed to all the powers and authorities which the author of the trust has in terms made incidental to such title.] By means of the limited executorship, they, in respect of the trust property, become personal representatives of the original testator. The present disposition of the trust estates is made, not by virtue of any special authority to appoint new trustees created by the author of the trust, but of that general power of regulating the devolution of the trust estates on their decease, which trustees possess by means of and as incidental to the power of nominating their own representatives, of the exercise of which power every ordinary devise of trust estates affords an example. By such devise the testator merely substitutes the devisees for the heir, to whom the property would otherwise descend. What extent of fiduciary discretion and authority may happen to devolve to the devisees with the estate will of course depend upon the nature of the trust and the terms of the instrument creating it. (Vide, ante, p. 782). Powers of appointing new trustees, as usually framed, would seem hardly to authorise a *testamentary* nomination by a sole surviving trustee, as it is the obvious intent of such clauses that the donee shall nominate his coadjutor, and not his successor. The form of a power extending to authorise a testamentary nomination, however, will be found among the Trustee Clauses.

under the hand and seal of [*obligor*], bearing date the —— day of ——, and also of [*other trust property*]. AND WHEREAS I am so possessed of the said sum of £—— Consolidated Annuities, and the said bond debt, and [*other trust property*], as sole surviving trustee of an indenture of settlement bearing date &c., being the settlement made on the marriage of the said [*name*], deceased, with the said [*name*], also deceased; AND WHEREAS the only children of the said [*name*] and [*name*], his wife, who attained the age of twenty-one years, were [*children*], and they the said [*children*] are now, under or by virtue of the trusts of the said indenture of settlement, absolutely entitled to the said trust-funds and premises comprised in the said indenture of settlement, in equal shares and proportions: NOW I HEREBY NOMINATE AND APPOINT them the said [*children*] to be my executors so far only as concerns the said trust-funds and premises so vested in me as such trustee of the said indenture of settlement as aforesaid. AND in case they the said [*children*], or any one of them, should survive me, I except the last-mentioned trust-funds and premises from and out of the operation and effect of the general executorship of my estate and effects hereinbefore conferred on or vested in the said [*general executors*].

—that cestuis que trust are all of age;

—appointment of children executors.

DEVISES OF REAL ESTATE.

69 *a*[1]. I GIVE AND DEVISE all my (*a*) freehold, copyhold, and customary messuages, lands, tenements, and heredita-

Freeholds and copyholds to such uses as

(*a*) This form possesses advantages which would in general entitle it to preference over a mere devise in fee simple: by vesting in the devisee a power of appointment, it enables him to dispose of the freehold lands by a single deed, and also discharged from judgment-debts (in favour of a purchaser without notice); (ante, Vol. 5, p. 64 *a*); and, with respect to copyholds, might have the further effect of avoiding an admission-fine; for, as the appointee would be in immediately under the will, he would be entitled to admittance without a previous admission of the donee himself, which would only become necessary in case of his retaining the property as devisee, or in case of the sale and admission of the purchaser not being effected with sufficient celerity to prevent the lord's seizure: ante, p. 604. Hence, even if dower had ceased to exist, there would be sufficient reason for continuing to introduce powers of appointment in wills as well as conveyances of estates in fee: but, in fact, the exclusion of dower is still an object not to be lost sight of, for the modifications of this right, made by the act of 3 & 4 Will. 4, c. 105, apply only to widows who were married

Utility of giving the devisee a power of appointment.

A. shall appoint, in default to him in fee;

ments, whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease I shall have any beneficial disposing power, to the uses following, (that is to say), To SUCH USES, for such estates, and upon and for such trusts, intents, and purposes, and charged and chargeable in such manner and form, as my son, [*name*], shall at any time or times, or from time to time, by any deed or deeds, to be attested or not attested, direct or appoint; And in default of such direction or appointment, and subject to any direction or appointment which shall not be a complete disposition of the fee-simple and inheritance of the said premises, To THE USE of my said son, his heirs or assigns for ever.

—trust and mortgage estates, with power of appointment by reference.

69 *a*[2]. AND I GIVE AND DEVISE all the real estate which is now vested in me as trustee or mortgagee, to the same or the like uses as I have expressed and declared concerning the hereditaments hereinbefore devised, subject, nevertheless, to the trusts and equities affecting the same respectively.

Devise to such uses as grandson shall ap-

69 *b*. I GIVE AND DEVISE all those two tenements, situate at ——, in the several occupations of —— and ——(*a*), to

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subsequently to the 1st of January, 1834; so that if a testator even now devises his freehold lands to A. in fee, and it happens that A. has a wife, to whom he was married in 1833, or any preceding year, he could not make a title to the inheritance exclusively of the dower, without the concurrence of his wife; though there is this important difference, that now, under the act of 3 & 4 Will. 4, c. 74, the concurrence of the wife might be given without a fine.

Advantage of precision in regard to local limits.

(*a*) Disputes are often occasioned by obscurities respecting the local extent and boundaries of devised lands; this not unfrequently occurs from the testator having, in several instances, applied to the subject of devise terms of description of unequal extent, raising the question, therefore, whether the less comprehensive term is restrictive: for instance, a testator gives his farm in the parish of A., in the occupation of B., or his farm called Blackacre, in the occupation of B., and it turns out that though the chief part of the testator's farm in the parish of A., or called Blackacre, is in the occupation of B., yet a small portion is occupied by some other person; whether such portion passes is the question. The cases on this point are not easily reconciled; but the inclination of modern judges is to treat the reference to occupancy, the narrower particular, as a mere redundance of description, and not as restrictive. See *Goodtitle* d. *Ratford* v. *Southern*, 1 Man. & Selw. 299; *Down* v. *Down*, 1 J. B. Moore, 80; S. C., 7 Taunt. 343 (which compare with *Doe* v. *Parkin*, 5 Taunt. 321). See also *Doe* v. *Gillard*, 5 Barn. & Ald. 785; *Doe* d. *Templeton* v. *Martin*, 4 B. & Ad. 770, 1 Jarm. on Wills, 713.

Disadvantage

The hint which such cases suggest is, not to incumber a description with

the uses following, (namely,) To SUCH USES, and for such intents and purposes, as my said grandson, [*name*], the eldest son of my said daughter, [*name*], shall, by deed or will duly executed, appoint, and, in default of such appointment, to the use of my said grandson, [*name*], his heirs and assigns for ever. (*Power to trustees to receive rents for maintenance during minority* (75*f*[1])).

point, and in default to him in fee.

69 *c*[1]. I DEVISE all [*parcels*], To SUCH USES as [*devisee*] shall by deed or will appoint; And, subject thereto, To THE USE of the said [*devisee*] during his life; With remainder To THE USE of [*trustee*], or, if he die before me, of his executors or administrators, [*or*, To THE USE of my said trustees], during the life of and in trust for the said [*devisee*]; With remainder To THE USE of the said [*devisee*], his heirs and assigns for ever.

Devise of freeholds to uses to prevent dower;

69 *c*[2]. IF the said [*devisee*] should die before me, I DIRECT that the said hereditaments shall go to and for the benefit of such person or persons, (including creditors of the said [*devisee*],) and, if more than one, in such proportions and for such estate or estates, and generally in such manner as the same would have gone if the said [*devisee*] had died seised thereof immediately after me, and as if his last will (if any) had then first taken effect.

—proviso against lapse.

69 *d*[1]. I HEREBY GIVE AND DEVISE the messuage, outbuildings, garden, and premises at ——, which I purchased of ——, to the uses following, (namely), To THE USE of my wife, [*name*], during her life; and immediately after the decease of my said wife, I GIVE AND DEVISE the said premises To SUCH USES, upon such trusts, and for such intents and purposes as my eldest son, [*name*], by any deed or deeds shall at any time or times or from time to time direct or appoint; And in default of such direction or appointment, and subject to any direction or appointment which shall not be a complete disposition thereof, To THE USE of the said [*eldest son*], his heirs and assigns for ever.

Devise to wife for life, with provision as to repair and insurance, then to son in fee, with power of appointment;

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particulars not requisite for the purpose of distinction; and they enforce the more general recommendation, that a person taking instructions for or preparing a will, should acquire the fullest information respecting the devised estates, in regard to locality, names, extent of tenants' holdings, &c.

of redundant description.

—wife to keep house and estate in good repair and order.

69 d^2. PROVIDED ALWAYS, AND I HEREBY DIRECT, that my said wife or her assigns shall, at her or their own expense, during her life, to the satisfaction of my said son, [*name*], his appointees, heirs, or assigns, for the time being, keep all the said messuage, outbuildings, garden, and premises in good, substantial, and tenantable repair, order, and condition, in all respects; AND ALSO shall, during such time, keep all the messuages and outbuildings, with all fixtures to the freehold, insured from loss or damage by fire to the amount of £—— [*or*, to the full value thereof respectively], in the joint names of herself and my said son, [*name*], his appointees, heirs, or assigns, in some respectable office or offices for insurance from fire, to be approved of by my said son, his heirs, appointees, or assigns; And that the monies to be recovered under or by virtue of any such insurance shall be applied in reinstating the property in respect of the destruction or damage whereof the same shall be recovered or received; AND that, in case my said wife and her assigns should at any time or times neglect to keep the said messuages, outbuildings, garden, fixtures, and premises, or any of them, in such repair, order, and condition, and insured as aforesaid, it shall be lawful for my said son, his appointees, heirs, or assigns, to supply or repair such neglect, default, or omission, in such manner and to such extent as he or they shall think proper; (but, as to any repairs of buildings, not without giving to my said wife or her assigns six calendar months' previous direction or notice to make such repairs); And further, that in case my said wife and her assigns should neglect to deliver to my said son, his appointees, heirs, or assigns, the receipt for any premium of insurance which ought to be paid for the purpose of insuring or keeping insured the said messuages, outbuildings, and fixtures, so directed to be insured, within ten days after the same premium shall first become payable, then it shall be lawful for my said son, his appointees, heirs, or assigns, to effect or keep on foot such insurance; And I DECLARE, that it shall be lawful for my said son, his appointees, heirs, or assigns, to recover the expenses of so supplying or repairing any such neglect, default, or omission of my said wife and her assigns as aforesaid, together with interest thereon after the rate of £5 per centum per annum, and all costs incident to the recovery thereof, by distress or entry upon and perception of the rents and profits of all or any of the said messuages and premises so devised to my

said wife for her life, or by mortgaging or selling the life interest of my said wife therein.

69 *e*. AND WHEREAS I have contracted with [*vendor*], of &c., for the purchase of certain freehold messuages and hereditaments at ——: NOW, I HEREBY AUTHORISE AND DIRECT my said trustees or trustee either to complete such purchase or to relinquish the same, as circumstances may require, and as they or he, in their or his discretion (if it should be a matter of choice), shall judge most expedient. AND I AUTHORISE my said trustees or trustee to accept such a title (whether strictly marketable or not) as they or he, in their or his discretion, shall deem it prudent or advisable to accept, and, if they or he think fit, to waive or dispense with any objections, requisitions, inquiries, or evidence, which they or he may be strictly entitled to insist on, make, or require, or which but for this authority they or he would be bound to make or require.

Recital of contract for the purchase of an estate; —discretionary power to trustees to relinquish or complete the contract.

69 *f*. I GIVE my freehold and copyhold lands at ——, which were conveyed and covenated to be surrendered to me by deed &c., TO SUCH USES as my nephew, [*name*], shall, at any time or times, by deed or will appoint; AND, subject thereto, TO THE USE of my said nephew, his heirs and assigns for ever; AND, in case a contract which is now pending for the sale thereof be carried into execution, or in case the same lands or any part thereof be under any circumstances sold, then I give to my said nephew the purchase-money which I or my executors shall receive for the same (*a*). AND I DIRECT that

Specific freeholds to nephew in fee, with power of appointment; if sold, the purchase-money in lieu.

(*a*) [As the law formerly stood, a contract for the sale of an estate which the testator had previously devised, had the effect of revoking the devise in equity, and the devisee took nothing but the mere legal estate, of which he was a trustee for the purchaser. The right to the purchase-money passed with the other personal estate of the testator. A doubt has been suggested whether the doctrine remains unaltered, (Sugden on Wills, 53, 1 Sugd. Vend. 304*), for which, however, there does not appear to be any foundation. The only alteration introduced by the Statute of Wills which can bear upon this subject, is the enactment (sect. 24), that, as to the property comprised in the will, it shall be construed to speak and take effect as if it had been executed immediately before the death of the testator. If this clause be applied

Effect of contract for sale of devised estate.

* [The passage referred to does not appear in the last edition of the Treatise on Vendors, (see p. 304), in deference, probably, to the decision cited post.]

all the costs of and incident to the said contract, whether the same be completed or not, shall be paid [out of my residuary personal estate and not] out of the said purchase-money.

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strictly and literally, there remains no room for any question; but it is suggested that the legislature, by enacting that the will is to be construed with reference to the property as if executed at the death, has let in all the niceties of construction which may be founded on the *state* of the property; and that to all intents and purposes the will must be construed, in the supposed case, as if it had actually been made after the contract; and a will made after the contract would carry the money to the devisee. Now, for what purposes, with reference to the property comprised in it, a will is to be looked at as if executed immediately before the testator's death, may be a question of some difficulty; but it is clear that it cannot be so looked at for the purpose of importing a presumption of what the testator intended when he made his will, founded on the state of his property at his death. Nor is it certain that a devise of an estate, *already* under contract for sale, would give the devisee more than the legal estate. (See *Drant* v. *Vause*, 1 You. & C. C. C. 580, a case decided on special circumstances). What is it but an ordinary devise of a trust estate? A devise of a mortgaged estate carries with it the right to have the debt paid out of the testator's personal assets; not because any such intention on the part of the testator is presumed, but because the personalty is the primary fund for the payment of the debt, and is so liable as much at the instance of an heir as of a devisee. On the other hand, in the case of a contract, the personalty is the fund to benefit by the sale; and it will do so as much against a devisee as against an heir. As against a general residuary devisee, it is obvious that it must be so; and as against a devisee of the specific property by description, it is equally clear that some special expressions would be required to raise any right against the personal representatives of the testator. (See *Knollys* v. *Shepherd*, cit. *Wall* v. *Bright*, 1 Jac. & W. 499; affirmed in D. P., 1 Sugd. Vend. 203, n.; 1 Jarm. on Wills, 148). But where the contract is posterior to the devise, all pretence for such a construction fails. It has accordingly been decided, since the above observations were written, that where the testator devises an estate and then contracts to sell it, the devisee is not entitled to the purchase-money: (*Farrar* v. *Earl of Winterton*, 5 Beav. 1; *Moor* v. *Raisbeck*, 12 Sim. 123). Where an agreement was entered into for a sale at a future time, and the vendor died intestate before the time arrived, it was held that the rents up to the time appointed belonged to the heir: (*Lumsden* v. *Fraser*, 12 Sim. 263). And a contract by a railway company under the powers of their act of Parliament with an incapacitated person does not change the nature of the property until the actual completion of the sale by a conveyance. (*Midland Counties Railway Company* v. *Oswin*, 1 Coll. 80). As to the effect of an election by a lessee to purchase under a right of emption given to him by his lease, upon a devise of the estate by a will made after the lease, see *Drant* v. *Vause*, 1 You. & C. C. C. 580. It must be observed, however, that the doctrine formerly went further than it can now be carried, for a contract was held in equity to be a revocation, on

69 *g*. PROVIDED ALWAYS, that if, at the time of my decease, I should have conveyed away the said estate, or any part thereof, my trustees or trustee for the time being shall invest the sum of £——, or a proportionate part thereof, to be ascertained by them or him in their or his absolute discretion, upon trusts corresponding with the above uses, as an equivalent.

Pecuniary legacy to trustees in lieu of estate devised to uses, if sold by testator.

69 *h*. I DEVISE my house at ——, with the garden and appurtenances, to my cousin, [*name*], during her life; AND so soon as she shall die, or cease to make such house her principal place of residence, or to keep the same in substantial repair and insured from damage by fire to the amount of £——, I DEVISE the same to such her daughters or daughter as then or at any time thereafter shall be unmarried for their or her lives or life; AND so soon as any of such daughters shall marry or cease to make the same her or their principal place of residence, or to keep the same in substantial repair and insured to the amount aforesaid, I DEVISE the same to the others or other of them for their or her lives or life; AND so soon as there shall be no such daughter who shall fulfil the conditions aforesaid, I DEVISE the same hereditaments To SUCH USES as my said cousin, [*name*], shall, notwithstanding coverture, by deed or will appoint; And, subject thereto, To THE USE of my said cousin, her heirs and assigns for ever.

Devise to cousin and her unmarried daughters successively, on condition of residence, &c.

69 *i*. I DEVISE my messuage and hereditaments at ——, To SUCH USES as my daughter, [*name*], shall at any time or times, notwithstanding coverture, by deed or will appoint; And, subject thereto, UNTO AND TO THE USE of my said daughter, her heirs and assigns for ever. BUT, during such time or times as my said daughter shall be married, I DEVISE the said hereditaments (subject to any such appointment as aforesaid), UNTO AND TO THE USE of my trustees or trustee for the time being, their or his executors, administrators, and

Devise to daughter in fee, with power of appointment, and trust for her separate use.

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the same ground as any other alteration in the form of the testator's estate was held to have that effect; and, therefore, though the contract eventually went off, either after the death of the testator or before, the devise continued to be revoked as to the equitable interest. (*Knollys* v. *Alcock*, 7 Ves. 558; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170). In the case of *Curre* v. *Bowyer*, 5 Beav. 6, n., where a purchase went off after the death of the vendor, by reason of the purchaser's laches, Sir J. Leach held, that, as there was a binding contract when the vendor died, the estate was converted, and belonged to his next of kin, and not to his heir.]

assigns, for the period of such coverture, IN TRUST for the separate use of my said daughter (*a*).

Devise of an estate in fee-simple for the separate use of a married woman, inalienable during coverture.

69 *k*. I DEVISE all that [*parcels*], TO SUCH USES as my daughter, [*name*], shall at any time or times (being unmarried) by deed appoint; AND, subject thereto, TO THE USE of my said trustees, their executors, administrators, and assigns, during the life of my daughter, [*name*], IN TRUST for her separate and inalienable use during her life; AND, subject thereto, TO SUCH USES as my said daughter shall (whether married or single) by will appoint; AND, subject thereto, TO THE USE of the person or persons who at my daughter's decease would be entitled thereto by descent in case she had died seised thereof in fee-simple by purchase and intestate, if more than one in equal shares as tenants in common, and his, her, or their heirs and assigns for ever (*b*).

Devise to trustees, during the minority of nephew, in trust to manage and receive the profits, and maintain nephew; subject thereto, to such uses as nephew shall appoint, and, in default, to him in fee;

69 *l*. I DEVISE all [*parcels*], TO THE USE of my said trustees, their executors, administrators, and assigns, during the minority of my nephew, [*name*], IN TRUST, in the discretion of my trustees or trustee, to let for any term or terms not exceeding fourteen years, and to repair, drain, improve, and manage the same, to pay all expenses and reasonable outgoings, and to adjust and settle accounts with any tenant or tenants; And to apply all or a competent part of the clear income therefrom in the maintenance and education of my said nephew; And to invest and accumulate any surplus of such income, With power to apply such accumulations, or any part thereof, towards the future maintenance or education of my said nephew; And, subject thereto, to hold such accumulations in trust for my said nephew, absolutely, if he should attain his majority, and if he should die under age, then for my brother, [*name*], absolutely. SUBJECT to the uses and trusts aforesaid, I DEVISE the said hereditaments TO SUCH USES as my said nephew shall by any deed or deeds appoint; And, subject thereto, To

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(*a*) [The interposition of a trustee is not essential to the creation of a trust for separate use; but it affords a more convenient and effectual protection to the wife, and enables her, with the concurrence of her trustees, to dispose of the estate without acknowledging the deed of disposition.]

(*b*) [The above limitations do not seem to be essential for the purpose of restraining a married woman from alienating a fee-simple estate devised to her. See *Baggett* v. *Meux*, 1 Coll. 138.]

THE USE of my said nephew, his heirs and assigns for ever. BUT, if my said nephew should die before me, or during his minority, I DEVISE the said hereditaments TO SUCH USES as my said brother, [*name*], shall by any deed or deeds appoint; AND, subject thereto, TO THE USE of my said brother, his heirs and assigns for ever.

—gift over, if nephew should die under age or before testator.

69 *m*. I GIVE to my elder son, [*name*], all that my copyhold farm, situate &c., now in mortgage to [*mortgagee*], for securing the sum of £—— and interest, to hold the same unto and to the use of the said [*elder son*], his heirs and assigns for ever, he or they paying and discharging the said mortgage debt of £——, which I intend shall be borne by the said estate exclusively of my other property (*a*); But any arrear of interest which shall be owing thereon at the time of my decease shall be paid out of my general personal estate.

Devise of estate in mortgage cum onere, except as to arrears of interest.

69 *n*. AND, subject and charged as aforesaid, I GIVE AND DEVISE all and singular my said messuages or tenements, farm, lands, and hereditaments, situate, lying, and being in —— aforesaid or adjoining parishes, and all other the freehold and copyhold or customary hereditaments, either in possession, reversion, remainder, or expectancy, in or over which, at the time of my decease, I shall have any devisable interest or power of appointment, with their appurtenances, TO SUCH USES as the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, shall at any time or times before the expiration of twenty-one years from the decease of such survivor, by any deed or deeds appoint; And in default of or subject to any such appointment, and in the meantime, I GIVE AND DEVISE

Devise and appointment of real estates (subject to annuities) to trustees, with power of appointment.

(*a*) Without a provision to this effect, the devisee of a mortgaged estate is entitled to have it disencumbered out of the general personal estate; and a gift of the land "subject to the mortgage" is not considered to indicate an intention that the devisee shall take the land cum onere, the words referring to the mortgage being merely part of the description of the property: *Serle* v. *St. Eloy*, 2 P. W. 386, and other cases cit. 2 Jarm. on Wills, 554; *Sargent* v. *Roberts*, 12 Jur. 429. Inquiry should always be made by persons taking instructions for wills, whether the testator's real estate (including in this term chattels real) is subject to any mortgages, and if so, by whom they are to be borne, as there can be no doubt that the rule which throws the burden on the general personal estate, very often defeats the intention.

As to devise of estate in mortgage.

all my said freehold and copyhold or customary hereditaments, and also all my leasehold hereditaments, with their appurtenances, UNTO AND TO THE USE of the said [*trustees*], their heirs, executors, administrators, and assigns respectively, upon the trusts hereinafter mentioned.

General devise of freeholds and copyholds, including trust estates, to such uses as trustees shall appoint;

69 *o*[1]. I DEVISE AND APPOINT all the freehold and customary hereditaments over which I have or may have any disposing power, (including estates vested in me as trustee or mortgagee), TO SUCH USES as my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, at any time or times before the expiration of twenty-one years from the decease of the survivor of the persons mentioned by name in my will, shall by deed appoint; And, subject thereto, I DEVISE all the said hereditaments (except customary hereditaments vested in me as trustee or mortgagee), and I BEQUEATH all the leasehold and personal estates over which I have or may have any disposing power, unto my said trustees, their heirs, executors, administrators, and assigns, respectively; But, as to trust and mortgage estates, subject to the equities affecting the same; And as to estates belonging to me beneficially, charged with the payment of my debts. I DECLARE, that my said trustees or trustee shall be seised and possessed of my freehold, customary, and leasehold hereditaments, (except leaseholds for years whereof there shall not be thirty years unexpired at my decease), upon the trusts hereinafter expressed. (*Trusts for conversion of personalty, discretionary power to sell realty, investment, &c.*, (52 *l*[2]), *&c.*)

subject thereto, devise and bequest of realty and personalty;

—trust for wife during widowhood, she repairing, insuring, &c.;

69 *o*[2]. UPON TRUST, that they the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, will and shall pay unto or permit and suffer my said wife to receive the rents, annual produce, and income of the said residuary real and personal estates so long as she continues my widow, she keeping the said hereditaments and premises in good tenantable repair and condition, and, as to the insurable buildings and erections thereon, insured to the full value thereof from damage by fire, and observing and performing the covenants, conditions, and agreements, contained in the leases under which the said leasehold hereditaments and premises for the time being shall be held, and also paying or allowing the rents payable under such leases, and

indemnifying or saving harmless my other estates from such rents, and from all loss, costs, charges, and expenses, in respect of such covenants, conditions, and agreements, and also maintaining and educating my children thereout, or such of them, being a son or sons, as shall be under the age of twenty-one years, or, being a daughter or daughters, as shall be under that age without being or having been married.

—and maintaining infant and unmarried children;

69 *o*[3]. And in case my said wife should marry again, then Upon trust, from and after such her marriage and during the remainder of her life, by and out of the said rents, annual produce, and income, to pay an annuity or yearly sum of £—— sterling, clear of all deductions, into the proper hands of her my said wife, so that the same may be for her sole and separate use, free from the control, debts, and engagements of her husband for the time being, and so that she may not have power to alienate, dispose of, charge, or receive the same or any part thereof by way of anticipation; Which annuity I direct shall be paid by equal quarterly payments, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December, in every year, the first payment thereof to be made on such one of the said quarterly days of payment as shall next happen after such marriage, but to be proportional only to the time which shall then have elapsed from such marriage, and a proportional part of such annuity in respect of any fraction of a quarter ending with her decease, to be paid to her executors or administrators on the quarter day next following her decease. And I direct, that my said trustees or trustee shall stand and be seised, possessed of, and interested in the said residuary real and personal estates, from and after the decease of my said wife, or, in case she should marry again, then from and after her marriage, but subject in the last-mentioned case to her said annuity, Upon trust for such child or children of mine as shall survive me and attain the age of twenty-one years or die under that age leaving issue, and such child or children of any child or children of mine dying before me as shall survive me and attain the age of twenty-one years, or die under that age leaving issue, and his, her, or their heirs, executors, administrators, and assigns respectively, in equal shares and proportions as between or among brothers and sisters, but so that the child or the children collectively of any deceased child shall take only such share as such deceased child would have taken if living. (*Maintenance and advancement,* (59 *a*) *or* (59 *c*)).

—if she marry, an annuity to her;

—and, subject to widow's life interest and annuity, in trust for testator's children and grandchildren per stirpes, on attaining twenty-one or leaving issue.

Devise of advowson to trustees;

69 *p.* I GIVE and DEVISE all that my advowson of or right of patronage and presentation to the rectory of ——, To SUCH USES as the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, shall at any time or times, before the expiration of twenty-one years from the decease of such survivor, by deed appoint, and, subject thereto, unto and to the use of them the said [*trustees*], their heirs and assigns for ever, UPON TRUST, that my said trustees or trustee for the time being will absolutely sell and dispose of the said advowson, either by public auction or private contract, and subject to such special or other stipulations as to biddings, title, evidence of title, compensation, indemnity, expenses, interest, postponement of payment of or security for purchase-money, or otherwise, as they or he may think fit, with power to buy in the said advowson at any auction, or to vary the terms of or rescind any contract relating thereto, and to resell the same; AND I DECLARE, that the proceeds of the sale of the said advowson shall form part of my residuary personal estate. PROVIDED ALWAYS, that it shall be lawful for my said trustees or trustee for the time being, with the consent of my said wife during her life, and after her decease at their or his own discretion, to postpone the sale of the said advowson for the purpose of enabling my said trustees or trustee for the time being to present to the said rectory or living such son of mine as shall first be qualified and willing to accept the same; And for that purpose, in case no son of mine should at the time of my decease be qualified and willing to accept the said rectory or living, to fill the vacancy therein (if any) in such manner and upon such lawful terms and conditions as my said trustees or trustee for the time being may deem most expedient. AND I DIRECT, that in case at any time after my decease and before the said advowson shall have been sold under the power hereinbefore contained, a son of mine should be qualified and desirous to accept the said rectory or living, and should signify such desire in writing to any trustee of my will for the time being, then my said trustees or trustee for the time being shall forthwith take, do, and perfect all such lawful measures, proceedings, and acts, as shall be requisite for the purpose of effectuating such desire; PROVIDED ALWAYS, that in case more than one son of mine should desire to be presented to the said rectory or living, the elder of such sons shall be preferred. I AUTHORISE my said trustees or trustee for the time being, in their or his absolute

—in trust to sell;

—authority, with wife's consent, to postpone sale of advowson, for the purpose of presenting a son of testator;

—to fill the vacancy in the meantime;

—option to sons successively to be presented on giving notice to any trustee;

—authority to sell advowson

discretion, to sell the said advowson to such son of mine as shall have been presented to the said rectory or living, upon such terms as such trustees or trustee may deem expedient, and in particular to leave all or any part of the purchase-money for the said advowson in the hands of such son at interest, upon such real or personal security or obligation as my said trustees or trustee may think fit. (*Freeholds and copyholds to such uses as trustees shall appoint; subject thereto, realty and personalty to trustees upon trust for conversion*, (52 *r*). *Income of residue to wife for maintenance of herself and maintenance and education of children after her death; Residue for children at twenty-one or marriage, &c.*, (55 *a*)). PROVIDED ALWAYS, that in case any son of mine should be presented to the said rectory or living of ——, under the provisions hereinbefore contained, then the benefit of such presentation shall be considered to be of the value of £——, and, in the division of my said residuary estate, such £—— shall be considered to have formed part of my residuary personal estate, and to have been paid to such son in part satisfaction of his share thereof.

to son who may be presented;

—value of living to be deducted from the share of the residue intended for son who shall be presented.

69 *q*. WHEREAS I am entitled in fee-simple in possession to the advowson or right of patronage and presentation of and to the rectory or parish church of ——, in the county of ——, and I am the present rector or incumbent of the parish church of —— aforesaid: NOW, I HEREBY GIVE AND DEVISE all that the said advowson, and right of patronage and presentation, with the appurtenances thereto belonging, TO SUCH USES as the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor or other the trustees or trustee of my will, shall at any time, within twenty-one years from my decease, by deed appoint, and, subject thereto, unto and to the use of the said [*trustees*], their heirs and assigns for ever, upon the trusts following: that is to say, UPON TRUST, that they the said [*trustees*] or the survivors or survivor of them, or the heirs of such survivor, will forthwith after my decease present to the said church such fit person, not being under the age of sixty-five years (*a*) at the time of

Devise by the owner of an advowson (being also incumbent) to trustees, in trust, to present a person above the age of sixty-five years, and then to sell.

(*a*) [The presentation to a vacant living is unsaleable. If the living is vacant before and at the time of the patron's death, the right for that turn devolves upon the executor as a chattel; but when the vacancy is occasioned by the death of the patron, he being incumbent, the elder title of the heir or devisee is preferred: *Holt* v. *Winchester*, 3 Lev. 47. See 7 Barn. & Cr. 147; ante, Vol. 1, p. 570.]

such presentation, as they or he shall, in their or his discretion, think proper, in order that such person may be instituted and inducted the rector, parson, or incumbent of the said parish church; And, subject to the foregoing trust, I DIRECT that my said trustees or trustee for the time being (*a*), shall with all convenient speed, after such person shall be so presented, instituted, and inducted as aforesaid, absolutely sell and dispose of the said advowson or right of patronage and presentation, with its appurtenances, by public auction or private contract, and otherwise in such manner and subject to such special conditions as to title, evidence, expenses, indemnity or otherwise, as they or he shall think fit, with power to buy in the same, or rescind or vary any contract relating thereto, and to resell, and by their or his receipt in writing to discharge the purchaser or purchasers thereof from responsibility for the application of the purchase money. And I DIRECT, that my said trustees or trustee for the time being shall stand possessed of the monies so to be received, Upon the trusts following, that is to say:—

Devise of real estate to trustees, with power of appointment;

69 *r*[1]. I GIVE AND DEVISE all and singular the freehold, copyhold, and customary manors, messuages, farms, lands, tenements, and hereditaments whatsoever, and wheresoever the same may be situate, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease I shall have any beneficial disposing power, To SUCH USES as the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, at any time or times before the expiration of twenty-one years from the decease of such survivor, shall by deed appoint; And, subject thereto, I GIVE AND DEVISE all my said freehold, copyhold, and customary hereditaments not otherwise hereinafter effectually devised, and I BEQUEATH all my leasehold estates, UNTO AND TO THE USE of my said trustees, their heirs, executors, administrators, and assigns respectively, according to the respective natures thereof.

(*a*) [As a provision that the next presentation should devolve upon the executors of a sole trustee would occasion some complication, the trust to present is allowed to devolve upon the heir, but, in accordance with the convenient rule observed throughout these forms, the power of sale is given to the executors, who also take a power of appointment.]

69 *r*[2]. And I direct and declare, that the power of appointment hereinbefore vested in my said trustees or trustee is given to them Upon trust, in the first place, by sale or mortgage of my real estates, or of such part or parts thereof as they or he shall think fit, to raise in aid of my personal estate a sufficient sum or sufficient sums of money for the payment of my funeral and testamentary expenses and debts, and the incumbrances on my real estates or any of them, and all costs, charges, and expenses of and incident to the execution of the trusts of my will; With power to give to any mortgagee or mortgagees any power or powers of sale, and any other usual or reasonable power or powers; And with power to sell by public auction or private contract, in one lot or in several lots, and subject or not to any special or other conditions or stipulations as to title, evidence of title, expenses, compensation, security for purchase-money, or otherwise; And to buy in any property which may be put up for sale; And to rescind or vary any contract for sale; And to sell again; And subject to the aforesaid uses and trusts—

—trust to pay debts, &c., by sale or mortgage;

69 *r*[3]. I give and devise all my manor, farm, lands, and hereditaments situate at ——, now or late in the occupation of [*name*], and containing about —— acres, with the appurtenances, and also all my farm, lands, and hereditaments situate at —— aforesaid, which at the date of this my will are in my own occupation, and contain, with the common rights thereto belonging, about —— acres, with the appurtenances, and also &c., with the appurtenances, Unto and to the use of my grandson [*name*], his heirs and assigns for ever; But in case my said grandson should die before me, then I give and devise the hereditaments and premises hereinbefore expressed to be given to him, unto and to the use of such his child or children as shall survive me, and if more than one, as tenants in common, and his, her, or their heirs and assigns for ever. But in case any of such children should die under the age of twenty-one years without leaving a child or children, then I give and devise his, her, or their share or shares (including any share or shares accruing under this gift) to the others or other of the said children, and if more than one, as tenants in common, and his, her, or their heirs and assigns for ever. And in case my said grandson should die before me, and not leave any child who shall survive me and attain the age of twenty-one years or die under that age leaving a child or children, or should die after me and under the age of

—specific devise to grandson at twenty-one or marriage;

—if son die under twenty-one, &c., to his children at twenty-one or marriage, as tenants in common;

—on failure of children, as to part to two nephews, with cross limitations in case of lapse

or death under twenty-one and unmarried;

twenty-one years without leaving any child, then, and in either of the said cases, as to the said manor, farm, lands, and hereditaments at ——, occupied by [*name*], I GIVE AND DEVISE the same unto my two nephews, [*name*], the son of my brother, [*name*], and [*name*], the son of my brother, [*name*], in equal shares as tenants in common, and their heirs and assigns for ever. And if either of my said nephews should die before me or under the age of twenty-one years and unmarried, then I DEVISE the said manor, farm, lands, and hereditaments at —— to the other of my said nephews, his heirs and assigns for ever.

—other lands to be sold and the produce divided among children of sister living at decease of grandson, with substitution of children of deceased children at twenty-one or marriage;

69 *r*[4]. AND as to my said farm, lands, and hereditaments in my own occupation, I DIRECT AND EMPOWER my said trustees or trustee to sell and dispose of the same, with such discretionary powers in the conduct of such sale as are hereinbefore mentioned, and to divide the clear produce of such sale amongst such of the six children, named ——, of my sister, [*name*], as shall be living at the decease of my said grandson, or, in case he should die in my lifetime, at my decease, and shall attain the age of twenty-one years or marry, and such children then living of any of the said six children who shall then be dead as shall attain the age of twenty-one years or marry, in equal shares as tenants in common; But so that the child or children of any deceased child of my said sister shall take only the share which his, her, or their parent would have taken if living. (*Investment and maintenance, see* 39 *a*[2].)

—devise of another estate to sister.

69 *r*[5]. AND as to [*other parcels*], in the occupation of [*name*], I GIVE AND DEVISE the same unto my said sister, [*name*], her heirs and assigns for ever. (*Other specific devises.*)

Devise of six houses, with yard and pump, to A. in fee;

—six adjoining houses to B. in fee, with right of way over yard, and use of pump;

69 *s*[1]. I DEVISE those six of my twelve freehold houses in —— which lie to the west of the others, with the yards, well, pump, and appurtenances, and also the deeds and muniments relating to the title to all the said houses, unto my son [*elder son*], his heirs and assigns, To THE USE AND INTENT that the owners and occupiers for the time being of my six adjoining freehold houses, or of any of them, and their respective servants, shall and may from time to time and at all times for ever, after my decease, have free right of way to, from, across, and over every part of the yard in front of the said six houses devised to my said son [*elder son*], for any purpose or purposes whatsoever, And also free access to and use of the well and pump in the said yard, He or they from

time to time, on demand, contributing one moiety of the expenses of keeping the said well and pump with the appendages in good order and repair, such repairs to be from time to time executed by my said son [*elder son*], his heirs or assigns, within twenty-one days after being thereunto requested by notice in writing left for him or them at any one of the said six houses hereby devised to him; With authority, on any and every default therein, to and for the owner or owners for the time being of the freehold of the other six of the said twelve houses, or of any one of such other six houses, to execute such repairs, and recover the expenses thereof by distress or entry upon and perception of the rents and profits of the first-mentioned six houses or any of them, in the same manner as if such expenses were rent service in arrear; And, subject to the uses aforesaid, I GIVE the first-mentioned six houses, yards, well, pump, and appurtenances, deeds and muniments, unto and to the use of my said son [*elder son*], his heirs and assigns for ever. AND I DEVISE the said six houses which lie to the east of the above-devised houses unto and to the use of my son [*younger son*], his heirs and assigns.

—devisee to covenant for production of title-deeds.

69 s^2. PROVIDED ALWAYS, AND I DECLARE, that the said title-deeds and muniments of title are given to my said son [*elder son*], on condition that he do, within three calendar months after demand thereof in writing by my said son [*younger son*], his heirs or assigns, execute and deliver to my said son [*younger son*], his heirs and assigns, at the equal expense of both parties, a covenant for the safe custody, production, and delivery of extracts from and abstracts of the said deeds and muniments, such covenant to be in the usual form, and qualified in the usual manner, and to be settled, in case of dispute, by the counsel for my said son [*younger son*], his heirs or assigns; in default whereof I GIVE the said title-deeds and muniments of title to my said son [*younger son*], his heirs and assigns.

Copyhold cottages to such uses as equitable mortgagee shall appoint;

69 t^1. I DEVISE my copyhold cottages and land at ——, the copies of court rolls and writings relating to which I have deposited with [*mortgagee*] as a security for £—— and quarterly interest at £5 per cent., To SUCH USES as the said [*mortgagee*], his executors or administrators, shall, at any time or times before the expiration of twenty-one years from his decease, by any deed or deeds appoint; AND subject thereto—

—subject there-

69 t^2. To THE USE AND INTENT, that my wife, [*name*],

to to use that widow may reside in one;

may, during her life, personally occupy and reside in such one of the said cottages as shall be held by me for my own residence at my decease, [*or certain rooms, as in* (12 *a*)], free from all customary and other rents and services, and all rates, taxes, repairs, and outgoings whatsoever; AND subject thereto—

—subject thereto to the use that she may receive a weekly payment, recoverable by distress and entry;

69 *t*[3]. TO THE USE, that my said wife may receive, out of the rents and profits of the other parts of the said cottages and lands during her life, the weekly sum of —*s.*, the first payment thereof to be made in full on the first Saturday after my decease, with power for my said wife from time to time, whenever any part of such weekly payment shall be in arrear for twenty-one days or more, to recover the same, with all intermediate arrears and all incidental expenses, by distress or by entry upon and perception of the rents and profits of the said cottages and land or any part thereof; AND subject thereto—

—legacies to children recoverable by distress and entry;

69 *t*[4]. TO THE USE AND INTENT, that each of my younger children, [*names*], who shall be living at the decease of my said wife and at my decease, may, within six calendar months after the decease of my wife, or if she die before me, my decease, receive the sum of £——, to be paid to them respectively by my son, [*name*], his heirs, appointees, or assigns; and if not paid within the time aforesaid, to be recoverable by the said respective legatees, or their respective executors, administrators, or assigns, by distress or entry upon and perception of the rents and profits of the said cottages and land, or any part thereof.

—subject thereto, to son in fee, with power of appointment;

69 *t*[5]. AND, subject to the uses and intents aforesaid, I DEVISE the said cottages and land TO SUCH USES as my eldest son, [*name*], shall at any time or times by deed or will (*a*) appoint; And, subject thereto, TO THE USE of my said son, his heirs and assigns. AND I DIRECT that my said son shall pay the costs of and incident to the admittance of my said wife under the foregoing devise in her favour in case such admittance should be required (*b*).

—devisee to take mortgaged land cum onere;

69 *t*[6]. AND I DIRECT that my said son, [*eldest son*], shall pay the principal and interest monies which at my decease shall

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As to giving power to appoint copyholds by will.

(*a*) [A power to appoint copyholds by will is useful, because, if the donee of the power dies without having been admitted, an appointee under his will will not have to pay a double set of fees. (See stat. 7 Will. 4 & 1 Vict. c. 26, s. 4, ante, p. 420).]

(*b*) [In strictness, the widow ought to be admitted; but if the heir came to be admitted, on payment of the full fine, the lord would have no remedy.]

be owing to the said [*mortgagee*] on the said deposit security, and exonerate my personal and other estate therefrom. And I EMPOWER the said [*mortgagee*], his executors, administrators, or assigns, to recover the said mortgage debt and interest, and all costs, in case the same should not be paid within a year after my decease, by selling the said cottages and land, together or in parcels, and in any manner, and subject to any special conditions, With power to buy in or vary or rescind any contract and to resell, and by receipt in writing to discharge any purchaser thereof from responsibility for the application of the purchase-money or for any irregularities attending any sale, and from the duty of taking notice whether any money be owing on the said security or not.

—power of sale to mortgagee.

70 *a*. I CHARGE my freehold and customary estates in aid of my personal estate with the payment of my debts [and the annuities and legacies given by my will or any codicil thereto]; And for that purpose I AUTHORISE my executors or administrators for the time being, [*or*, my trustees or trustee for the time being,] whether the deficiency of my personal estate shall have been ascertained or not, to mortgage all or any part of my freehold and customary estates, subject or not to powers of sale and other usual powers, And to sell all or any part of my real estates, together or in parcels, by public auction or private contract, and subject to any special stipulations as to reserved biddings, time, title, evidence of title, compensation, indemnity, arbitration, security for purchase-money, or otherwise; With power to buy in at any sale, or to rescind or vary any contract of sale, and to re-sell. [And, on any such mortgage or sale, to bargain and sell or appoint the hereditaments included therein to the use of the mortgagee or purchaser, or to such uses as he shall direct (*a*).]

Charge of debts and legacies.

70 *b*. I DECLARE, that no trust or provision for the payment of debts contained in my will shall extend to any debts which shall remain unpaid after the time when the remedy for the same would, but for such trust or provision, have been barred by the Statute of Limitations, unless, in any particular case or cases, my executors or trustees or trustee should think fit to

Trust for payment of debts not to exclude Statute of Limitations.

(*a*) [This last power will not be required if the legal estate is vested in the trustees or executors. But where part or all of the real estates are copyhold, it is desirable to avoid vesting the legal estate in the trustees. Vide ante, p. 604.]

waive the benefit of the Statute of Limitations or of this declaration.

Devise of freeholds, subject to a charge of a legacy;

—interest;

—power of distress and entry;

—proviso for lapse.

70 *c.* I DEVISE all my freehold messuage, &c. unto [*devisee*], of &c., his heirs and assigns, To THE USE, nevertheless, that [*legatee*], of &c., his executors, administrators, or assigns, may receive thereout the gross sum of £——, within eighteen calendar months from my decease, with interest thereon at £5 per cent. from the expiration of one year from my decease; And, if the said sum and interest be not paid within the time aforesaid, may distrain upon or take possession or receive the rents of the said hereditaments (*a*), until the same with all costs and intermediate interests are recovered; And, subject to the charge and powers aforesaid, To THE USE of the said [*devisee*], his heirs and assigns for ever. PROVIDED, that, if the said charge should fail by lapse or otherwise, such failure shall be for the benefit of the said [*devisee*], his heirs and assigns.

Devise of real estate, subject to payment of debts, &c.;

—power to sell or mortgage.

70 *d.* I DEVISE all my freehold and customary hereditaments, To SUCH USES as [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee, shall, at any time or times before the expiration of twenty-one years from the death of such survivor, by deed appoint; And, subject thereto, I AUTHORISE my said trustees or trustee, at any time or times or from time to time during such period, to demand and recover by entry and distress, or otherwise, the rents and profits of the said hereditaments. AND I give the aforesaid powers to my trustees or trustee, IN TRUST, that they or he will, by sale or mortgage of all or any parts of my said real estates, or out of the rents and profits thereof, raise such monies as may be required in aid of my personal estate for payment of my funeral and testamentary expenses, debts, and the annuities and pecuniary legacies given by my will or any codicil thereto; With power to give to any mortgagee any power of sale under special conditions or otherwise, and any other usual or reasonable powers, and to sell subject to any special conditions and stipulations whatsoever, and to buy in any hereditaments at any sale, or to rescind or vary any contract relating thereto, and to re-sell the same; And by their

(*a*) [See *Wigg* v. *Wigg*, 1 Atk. 382; *Emes* v. *Hancock*, 2 Id. 503; *Sherman* v. *Collins*, 3 Id. 319; *Manning* v. *Herbert*, Amb. 575.]

or his receipts in writing to discharge purchasers and mortgagees from responsibility for any monies paid by them. AND I DECLARE, that no purchaser or mortgagee shall be answerable for any want of authority to make or irregularity attending any such sale or mortgage. AND, subject to the powers and trusts aforesaid—(*Devise to beneficial takers*).

Power of mortgaging real estates to pay debts and legacies;

70*e*. I DIRECT my executors to pay my funeral and testamentary expenses, debts, and legacies, out of my general residuary personal estate; and if that should not be sufficient for the payment thereof, I EMPOWER AND DIRECT the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, to raise money sufficient to pay the same by mortgage of the whole or any part of my real estates hereinbefore devised and appointed respectively. And for the purpose of effecting any such mortgage or mortgages, I DECLARE that it shall be lawful for my said trustees or trustee, by any deed or deeds, to limit and appoint the said estates, or any part thereof, to any person or persons or the nominee or nominees of any person or persons who shall advance any sum or sums of money on such security, either in fee simple or for any term or terms of years, and either with or without a power of sale in case of default being made in the payment of the principal and interest monies at the time or times to be appointed for the payment thereof respectively, and with such other and accompanying powers, clauses, and provisions, as shall be deemed expedient; And to give receipts for the money so to be advanced; And that such receipts shall discharge the persons to whom the same shall be given from being accountable for the misapplication or being obliged to see to the application of the money therein mentioned and acknowledged to be received; And further, that no mortgagee or mortgagees shall be bound to inquire into the necessity or propriety of any such mortgage or mortgages, or be affected by express notice that the same is or are unnecessary and improper.

—to give receipts.

Power to mortgage for payment of debt and legacies;

70*f*. I AUTHORISE my said trustees or trustee to raise money in aid of my personal estate for payment of my debts or legacies, by mortgage of all or any part of my said hereditaments, such mortgage or mortgages to be in such form, and with such powers of sale or otherwise, as they or he shall think fit. I DECLARE, that no mortgagee of any of the said heredita-

ments shall be concerned to ascertain that such mortgage is expedient or proper. And that such mortgagee or mortgagees shall hold the said mortgaged hereditaments free from any annuites hereby charged thereon, but not so as to entitle any annuitant or the owner or owners of the equity of redemption to exoneration out of my personal estate, in competition with pecuniary or specific legatees. And, if any of my said hereditaments be sold free from any annuity or annuities charged thereon, the same shall be a charge upon the produce of such sale and the investments thereof, unless and until my trustees or trustee shall set apart a sufficient fund or security for the payment thereof, or shall purchase, in the name or respective names of the annuitant or annuitants, an annuity or annuities of like amount; such annuity or annuities, if not purchased from Government or a public company, to be adequately secured on freehold, copyhold, or leasehold hereditaments.

—provision as to rent-charges in case of mortgage or sale.

70 *g*. And I direct and declare, that my debts and the several annuities and pecuniary legacies given and bequeathed by my will or any codicil thereto, shall stand and be charged upon all my real estates hereby devised to the said [*devisee*], not merely in aid of my personal estate, and in the event of the same being deficient, but equally therewith in the first instance; And that it shall be in the option of my creditors and the said annuitants and pecuniary legatees, and any of them, to resort to whichever fund they shall think fit.

Charge of debts on specific real estate and personalty, pari passu.

70 *h*. I devise my messuage and lands at ——, which I purchased of &c., with their actual and reputed appurtenances, To such uses as [*legatee*], of &c., his executors, administrators, or assigns, shall, at any time or times before the expiration of twenty-one years from his decease, by deed appoint. And, subject thereto, I charge the said hereditaments with the payment unto the said [*legatee*], his executors or administrators, of the sum of £——, within a year from my decease, and, in case such sum should not then be paid, of interest thereon after the rate of £4 per centum per annum from the expiration of such year, by equal quarterly payments. And, subject thereto, I devise the said hereditaments Unto and to the use of [*devisee*], of &c., his heirs and assigns. I declare, that the power of appointment hereinbefore limited to the said [*legatee*], his executors, administrators, or assigns, is so limited as a security only for

Specific devise in fee, subject to charge of legacy;

—power of sale;

the payment to him or them of the said sum of £—— and interest. And that, after the expiration of fifteen calendar months from my decease, the said [*legatee*], his executors, administrators, or assigns, may sell the said hereditaments, together or in parcels, by public auction or private contract, and subject to any special stipulations as to reserved biddings, time, title, evidence of title, compensation, indemnity, arbitration, security for purchase-money, or otherwise, With power to buy in at any sale or to rescind or vary any contract of sale, and to resell; And, for the purposes of such sale, I GIVE to the said [*trustees*], their executors and administrators, all the deeds and evidences of title and abstracts of or relating to the title to the said hereditaments, IN TRUST to permit the said [*legatee*], his executors, administrators, or assigns, to investigate and prepare abstracts of the title thereto, and to permit the purchaser or purchasers thereof, or of any part thereof, to investigate such title; And, subject thereto, IN TRUST for the person or persons who shall for the time being be entitled to the freehold in possession of the said hereditaments; And in case the said [*legatee*], his executors, administrators, or assigns, should not be allowed, or should not be able without suit, to investigate and make an abstract of the title to the said hereditaments, he or they may sell subject to such special conditions as he or they may be advised or may think fit to adopt under such circumstances. AND, after payment of the said sum of £——, and any arrears of interest thereon, and all costs incident to the recovery thereof, shall pay any surplus of the proceeds of such sale unto the said [*devisee*], his heirs or assigns. BUT if any person should exercise the foregoing power of sale before the expiration of three calendar months from the service of a notice in writing of the intention to sell on some person for the time being in the occupation of the said hereditaments or some part of them, or after the full payment of the said sum of £—— and interest, and all costs incurred before the payment of such sum and interest, then I DECLARE, that the said sum of £—— shall be forfeited, and with such interest thereon as shall have been so paid, and also the produce of any such sale or sales shall be held by the person or persons who shall have received the same IN TRUST for the said [*devisee*], his heirs or assigns. BUT no purchaser shall be concerned to ascertain that any part of the said legacy remains unpaid, or be affected by notice that such sale, or any conditions under which the same may be made, is or are irregular or unauthorised, or be answerable for

—bequest of title-deeds to trustees;

—if legatee cannot inspect title, he may frame his conditions of sale accordingly;

—forfeiture of legacy;

—indemnity to purchasers;

the application of any monies he may pay to the said [*legatee*], his executors, administrators, or assigns, on his or their receipt in writing. And I declare, that if the said [*legatee*] should die in my lifetime, the said legacy shall not be raised, but shall fail for the benefit of the said [*devisee*].

—proviso against lapse.

Devise of incumbered real estate (subject to power of appointment in trustees) to wife for life; then to children and the issue of deceased children at twenty-one or marriage, in equal shares;

70 *i*[1]. (*Devise of estate which has been mortgaged in fee, cum onere, to wife for life, remainder to children as tenants in common, with full discretionary powers to trustees to deal with the estate in case the money should be called in during the infancy of the devisees. Adapted to the case where the estate is subject to several incumbrances; also, where the mortgage was for a term of years. Powers of partition, advancement, and maintenance*).—I devise all my freehold and copyhold estates at ——, which I purchased from [*name*], To such uses as my trustees or trustee for the time being shall at any time or times, before the expiration of twenty-one years from the decease of the survivor of my trustees herein named, by deed appoint (*a*). And, subject thereto, To the use of my wife during her life, and, after her decease (*to the use of testator's children as tenants in common* (71 *b*[2])).

—mortgages, &c., to be a charge upon devised estate, in exoneration of personalty;

70 *i*[2]. I declare, that all principal and interest monies and annuities, which at my decease shall be specifically secured or charged by way of mortgage, deposit of deeds, or otherwise than merely by judgment or other statutory charge upon the last-mentioned hereditaments or any part of them, either alone or jointly with any other hereditaments, shall (except as to arrears of interest or of any annuity or annuities actually owing at my decease) be a primary charge upon the hereditaments included in such specific charge, in exoneration of my personal estate and of my other real estates.

—discretionary power to trustees, with consent of wife, or during minority of any devisee, to arrange with incumbrancers, join in transfers, mortgage, sell, &c.;

And I authorise my trustees or trustee, at any time or times or from time to time during the life of my wife and with her consent, and after her decease and during the minority of any child or grandchild of mine presumptively entitled to any share in the said hereditaments, at their or his discretion, to join in any transfer of any mortgage or other incumbrance upon all or any part of the said hereditaments, or to give further security for

(*a*) [If the testator has merely an equity of redemption, this power of appointment is, of course, nugatory; but the legal inheritance may never have passed to the incumbrancer, or the testator, having created incumbrances upon his equity of redemption, may, after the date of his will, take a conveyance to himself of the legal estate from the first mortgagee.]

or to pay off all or any part of any such mortgage or incumbrance; And, for that purpose, To adjust and settle any accounts with any incumbrancer or incumbrancers; To mortgage, sell, lease, or otherwise deal with the said hereditaments or any part thereof; And upon any such transfer or mortgage, if it should be deemed expedient, to give to the transferee or transferees, mortgagee or mortgagees, any power of sale, or any other usual or reasonable power or powers; And to make any such sale by public auction or private contract, and subject to any special conditions or stipulations as to title, evidence of title, or otherwise, and to buy in any such hereditaments at any sale, and to rescind or vary any contract relating to any such hereditaments, and to resell the same; And to get in any legal estate or estates, and to cause the same from time to time to be conveyed in such manner as they or he shall think fit; And to deal in any such manner as aforesaid with any part or parts of the said hereditaments or any incumbrance or incumbrances thereon, without at the same time dealing with any other part or parts thereof or incumbrance or incumbrances thereon; And by their or his receipts in writing to discharge all persons paying any trust-monies from responsibility for the application thereof.

70 *i*[3]. And, with such consent or at such discretion as aforesaid, to allot any part or parts of the said hereditaments to any person or persons in lieu of any undivided share which may be vested in him; And, for equality of partition, to charge or raise by any of the means aforesaid, upon or out of any part or parts of the said hereditaments, any sum or sums of money. —to partition real estate among devisees;

70 *i*[4]. And, with such consent or at such discretion as aforesaid, to convert into money, or otherwise apply for the benefit and advancement in the world of any person or persons who shall be presumptively entitled to any share in the said hereditaments, not more than one-half part of his, her, or their presumptive share or shares. And, after the decease of my wife, to apply, for the maintenance and education of each minor who shall be actually or presumptively entitled under my will to any share of the said hereditaments, the whole or a competent part of the clear income from such share, and either to apply the surplus (if any) of such income in the reduction of any charges or incumbrances upon the said hereditaments, or to accumulate and invest the same in the funds or on mortgage of real estate, With power from time to time to vary such investments, and to apply any such accumula- —advancement; —maintenance; —to accumulate surplus income, or apply it in reduction of incumbrances,

tions either towards the maintenance or education of any person or persons actually or presumptively entitled thereto, or in reduction of any charges or incumbrances upon the said hereditaments.

In case mortgagee of settled estate should sell, trustees to receive and invest surplus produce.

70 *k*. I DIRECT, that, in case any hereditaments devised by my will should at my decease be subject to any mortgage or charge, and should afterwards be sold by or at the instance of any mortgagee or incumbrancer, any surplus produce of such sale, after satisfaction of the mortgage or charge and all incidental costs, and also any monies which shall be recoverable out of my personal estate or otherwise in exoneration of such hereditaments or the produce thereof from such mortgage or charge, shall be received by my trustees or trustee, who shall invest the same in the purchase of other freehold or copyhold hereditaments, to be conveyed to the uses and upon the trusts herein limited concerning the hereditaments which shall have been sold; With power, in the meantime, to invest the same in the funds or on mortgage of real estate, and from time to time to vary such investments; Such investments and the income therefrom to be held upon trusts corresponding as nearly as may be with the uses and trusts herein limited concerning the hereditaments which shall have been sold.

Mortgaged estates to be taken cum onere.

70 *l*. I DECLARE, that all mortgages, annuities, and other specific incumbrances or charges, other than mere debts of record, which at my decease shall affect any freehold, copyhold, or leasehold hereditaments hereby devised [(other than the said hereditaments hereinbefore devised for the benefit of my said son, [*name*], and his issue),] shall be exclusively charged upon and payable out of such hereditaments, in exoneration of my other real estate and my personal estate.

Devise of specific estate to son, charged with legacies (one being given to trustees in trust);

70 *m*. I GIVE my farm and lands at ——, which I purchased of [*name*], unto and to the use of my son, [*name*], his heirs and assigns for ever: But subject to and charged with the payment of the following legacies, clear of all deductions except legacy duty, with interest thereon at £4 per cent. from the time of my decease, which legacies are not to be paid out of my personal estate, (namely), To each of my nephews and nieces, [*names*], the sum of £——, (as to nieces for their sole and separate use); To my trustees or trustee for the time being the sum of £——, to be held upon the trusts

hereinafter declared. I AUTHORISE the said respective legatees or their respective executors, administrators, or assigns severally, to raise their said respective legacies, and the interest thereon, and all incidental costs, in case the same should not be paid before the expiration of a year from my decease, by distress or entry upon and perception of the rents and profits of the said hereditaments (*a*); PROVIDED ALWAYS, that, after the expiration of ten years from my decease, no purchaser or mortgagee of the said hereditaments or any part thereof, shall be bound to inquire whether such legacies have been paid, or be accountable for the non-payment thereof; [*or better*, AND I AUTHORISE my trustees or trustee for the time being, at any time or times to receive payment of all or any of the said several legacies which shall not have been previously paid, in trust for the respective legatees, whether they be of full age and capacity or not, and to give receipts in writing for the same, which shall discharge the said hereditaments therefrom.]

—power to raise legacies by distress and entry;

—indemnity to purchasers and mortgagees.

70 *n*[1]. I GIVE my houses and lands at—— unto and to the use of [*devisee*], his heirs and assigns for ever; but subject to and charged with the payment of the following legacies, with interest thereon at £4 per cent. from the time of my decease, and clear of all deductions except legacy duty, (namely,) To each of my sons, [*names*], £——; To each of my daughters, [*names*], the sum of £——; To my sister, [*name*], the sum of £——, and to the child or children of my brother, [*name*], who shall be living after my decease, and attain the age of twenty-one years, or die under that age leaving issue, the sum of £——, to be equally divided between or among them if more than one; AND I DECLARE that the said legacies shall not be payable out of my personal estate.

Devise charged with legacies;

70 *n*[2]. AND I AUTHORISE my said trustees or trustee for the time being, at any time or times, to receive payment of any of the said several legacies which shall not have been previously paid, and by their or his receipts in writing to discharge the said hereditaments from the same.

—authority to trustees to receive legacies;

70 *n*[3]. AND I DECLARE, that in case any of the said legacies should not be paid before the expiration of a year from my decease, it shall be lawful for my said trustees or trustee, at

—power to trustees to raise legacies by sale or mortgage, or by distress and entry;

(*a*) [This is a convenient mode of charging legacies on land, where the amount of the charge is small in comparison with the value of the land.]

any time after the expiration of three calendar months' notice in writing given to or left for the said [*devisee*], his heirs or assigns, at his or their usual or last known residence or residences in England, or left for him or them on the said devised hereditaments (such notice to be given either before or after the expiration of the said year, and either by my said trustees or trustee, or by any of the said legatees), at any time or times to raise the said legacies and interest, so charged on the said hereditaments at ——, and all incidental costs, by sale or mortgage of all or any part thereof, and in the meantime to raise any or any part or parts of the said legacies, interest, and costs, by distress or entry upon and perception of the rents and profits of the said hereditaments.

—power to sell, subject to special conditions; —to give powers of sale, &c., to mortgagee;

70 *n*[4]. And I empower my said trustees or trustee, in exercise of the foregoing power of sale or mortgage, to sell, subject to any special conditions as to title, evidence, expenses, compensation, indemnity or otherwise, and to buy in or rescind or vary any contract, and resell; And to give to any mortgagee or mortgagees any power of sale, and any other usual or reasonable powers; And to appoint the hereditaments which shall be sold or mortgaged to such uses as the purchaser or purchasers, or mortgagee or mortgagees, shall direct; And, by their or his receipts in writing for any purchase or mortgage monies, to discharge the person or persons paying the same from responsibility for the application thereof or for any irregularity attending any sale or mortgage, and from the duty of inquiring whether any such sale or mortgage is authorised, necessary, or proper.

—indemnity to mortgagees and purchasers;

—power to raise interest for maintenance; —accumulations; —destination of accumulations if legacy fails;

70 *n*[5]. I authorise my said trustees or trustee, in their or his discretion [to postpone raising all or any part of such of the said legacies as for the time being shall belong to any infant (*a*), until such infant shall attain his or her majority, and] to raise and apply the interest, at the rate aforesaid, on the vested or presumptive legacy of any minor for his or her maintenance and education, the unapplied surplus (if any) of such interest to accumulate and follow the destination of the principal, but to be applicable to future maintenance and education, and, in case the principal should not become raisable, to belong to the person or persons who shall have been entitled, at the time of raising the same, to the hereditaments out of which the same shall be raised, as personal estate.

(*a*) [The legacies to the testator's children are not made contingent on their attaining twenty-one.]

70 *n*[6]. And I authorise my said trustees or trustee to raise not more than one half [*or*, all or any part] of the presumptive or vested legacy of any minor for his or her benefit or advancement in life, or, if they or he should think it expedient, for the maintenance and education of such minor; And to invest any legacies and trust-monies which shall not be immediately applicable in the funds or on mortgage of real estate, With power from time to time to vary such investments.

—power to apply capital of presumptive or vested legacy for advancement or maintenance.

71 *a*. In trust for my only child or all my children living at my decease, if more than one in equal shares, and his, her, or their heirs and assigns; And as to the share or shares of any my child or children dying after me under the age of twenty-one years and unmarried, Upon the trusts herein declared concerning the other share or shares (*a*). And, should any child or children of mine be now dead or die before me, then, as to the share which such child or each of such children would have taken if living at my decease, In trust for his or her child or children living at my decease, and if more than one in equal shares, and his, her, or their heirs and assigns. And, as to the share or shares of any one or more of such grandchildren dying under the age of twenty-one years and unmarried, Upon the trusts herein declared concerning the other share or shares of the same family of grandchildren. And, as to the share hereby intended for the child or children of any such deceased child of mine, in case no child of such deceased child should survive me and attain the age of twenty-one years or marry, Upon the trusts herein declared concerning the other shares of the said trust-premises. And, as to all the said trust-premises, in case no child or grandchild of mine should survive me and attain the age of twenty-one years or marry, In trust for &c. (*Maintenance and advancement*, (59 *c*) *or* (71 $b^{\frac{1}{2}}$)).

Trust for testator's children, with cross limitations and gift over;

—provision for death of children in testator's lifetime.

71 b^1. I devise all my freehold and copyhold estates To such uses as my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, shall at any time or times before the expiration of twenty-one years from

Devise of real estate to such uses as trustees shall appoint; subject thereto, to children and issue of de-

(*a*) [These few words seem to express with precision all that is intended by complete cross limitations. More elaborate limitations usually fail either in completeness of provision or in technical accuracy of expression. The above form may be adapted to limitations of the legal estate.]

Form of cross limitations.

ceased children, at twenty-one or marriage;

the decease of the survivor of the persons mentioned by name in my will, by deed appoint; AND, subject thereto, as to trust and mortgage estates, To THE USE of my said trustees, their heirs and assigns, upon the trusts affecting the same; AND, as to estates to which I am beneficially entitled,

71 *b*[2]. To THE USE of such child or children of mine as shall be living at my decease, and the child or children then living of any children of mine dying before me, and his, her, or their heirs and assigns, and if more than one, in equal shares as between or among brothers and sisters, but so that the child or the children collectively of any deceased child of mine shall take such share only as his, her, or their parent would have taken if living; But, in case any child or grandchild of mine should die under the age of twenty-one years without leaving issue living at his or her decease, I DEVISE his or her share in the said estates to the uses herein limited concerning the other shares of the said estates, (including this present limitation); And if no child or grandchild of mine should survive me and attain the age of twenty-one years, or leave issue living at his or her decease, I DEVISE the said estates (*ulterior uses*).

—clause of accruer on death under twenty-one;

—authority to receive rents and profits for maintenance; (*general form*).

71 *b*[3]. AND I AUTHORISE my said trustees or trustee for the time being, during the minority of any child or grandchild of mine [*or*, of any minor actually or presumptively entitled to any real estate or share of real estate under my will for life or in tail or in fee, whereof the income is not otherwise disposed of by my will], to receive the rents and annual produce and income (not otherwise disposed of) of the real estate or share of real estate to which such minor shall be presumptively or actually entitled, and apply the same for his or her maintenance and education, And to invest any unapplied surplus of such income in the funds or on real security in England or Wales, and accumulate the same; With power to resort to such accumulations for the maintenance, education, or benefit of any minor presumptively or actually entitled thereto; [AND I DECLARE, that any unapplied accumulations of income, arising either from a vested or a presumptive share or estate, shall be added to and follow the destination of the share or estate from which the same shall arise, but the person or persons in whom such accumulations shall vest shall take the same as personal estate.]

Specific lands to brother for life, with re-

71 *c*. I GIVE AND DEVISE my freehold lands and hereditaments at ——, which were conveyed to me by deed made on

or about &c., UNTO AND TO THE USE of my brother, [*name*], during his life, without impeachment of waste; And, after his decease, UNTO AND TO THE USE of his child or children and the child or children living at my decease of any child or children of my said brother who shall be dead at my decease, and if more than one in equal shares as between or among brothers and sisters, and his, her, or their heirs; But so that the child or the children collectively of any deceased child shall take only the share which such deceased child would have taken if living; And, in case any such child or grandchild should die under the age of twenty-one years without having been married, [*or*, without leaving issue], I GIVE AND DEVISE the share or shares of such child in the said lands and hereditaments TO THE USES herein limited concerning the other shares (including this present limitation); And in case no child or grandchild of my said brother should be living after my decease and attain the age of twenty-one years or marry, [*or*, leave issue], I GIVE AND DEVISE the said hereditaments UNTO AND TO THE USE of my said brother, his heirs and assigns for ever. (*Substitution of pecuniary legacy, if estate is sold by testator in his lifetime*, (69 *g*); *Maintenance clause*, (71 *b*[3])).

mainder to his children in common in fee, and cross limitations.

71 *d*[1]. I DECLARE, that my said trustees or trustee shall be seised and possessed of my freehold, customary and leasehold hereditaments (except leaseholds for years whereof there shall not be thirty years unexpired at my decease), UPON TRUST for my wife during her life, [for the maintenance of herself and my [infant and unmarried] sons and unmarried daughters]. AND, after her decease, UPON SUCH TRUSTS for the benefit of any child or children or other issue of mine, (such issue being in existence before the decease of the survivor of my wife and children), as my wife shall by deed or will, notwithstanding coverture, appoint. AND, subject thereto, UPON TRUST for such child or children of mine as shall survive me and attain the age of twenty-one years or die under that age leaving issue, and such child or children of any child or children of mine dead at my decease as shall survive me and attain the age of twenty-one years or die under that age leaving issue, and his, her, or their heirs, executors, administrators, and assigns, in equal shares as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of mine shall take only such

Trusts of realty (except leaseholds for short terms) for wife for life, then for issue as she shall appoint;

—in default, for children and issue of deceased children at twenty-one;

share as his, her, or their parent would have taken if living.

—hotchpot.

71*d*[2]. PROVIDED, that no one of my issue to whom or to whose issue any appointment or appointments shall be made shall take any benefit under the foregoing limitation in default of appointment, unless the benefit of such appointment or appointments be brought into distribution under the said limitation in default of appointment, or allowed for accordingly. (*Maintenance* (59 *c*) *or* (71 *b*[3]); *see* (75*f*)).

Devise of specific messuage for residence of wife and children;

71 *e*. I GIVE to my said trustees and their heirs [*parcels*], IN TRUST for my wife during her widowhood; And after her decease or marriage, IN TRUST for the residence and benefit of my younger children for the time being, until the youngest of them for the time being shall have attained the age of twenty-one years, at which time or at the determination of my wife's widowhood, whichever shall last happen, it shall be in the option of such of my children as shall then be living, the elder to have the choice before the younger, to purchase the same messuage and lands, at a valuation to be made by a surveyor appointed by my said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being; And if none of my children should purchase the same, then the same shall be sold by my trustees or trustee, in such manner and subject to such conditions as they or he shall think fit; And the produce in either case shall be divided among such of my children as shall be living at such last-mentioned time, and the issue then living of any deceased child or children, [other than a tenant for life or in tail in possession of my residuary real estate or the issue of a deceased tenant for life or in tail who shall have been in possession thereof,] in equal shares as between or among brothers and sisters; But so that no issue of any issue of mine then living shall be included in this gift; And so that the child or the children collectively of any deceased child or grandchild shall take only the share which his, her, or their parent would have taken if living; And if there be no such issue, then UPON TRUSTS corresponding to the uses and trusts herein declared of my residuary real estate.

—option to eldest child to purchase; in default, to be sold; the proceeds equally divided among children then living and issue of deceased children, [other than tenant for life or in tail of residuary estates.]

Devise of real estates to trustees, with a discretionary

71*f*. I GIVE all my freehold and copyhold estates [not hereinbefore specifically devised], TO SUCH USES as [*trustees*], of &c., or the survivors or survivor of them, or the executors

or administrators of such survivor, or other my trustees or trustee for the time being, shall, before the expiration of twenty-one years from the death of such survivor, by deed appoint; AND, subject thereto, I GIVE the same and my leasehold hereditaments, UNTO AND TO THE USE of my said trustees, their heirs, executors, administrators, and assigns, respectively, charged with the payment of my debts; AND, subject thereto, UPON TRUST, (*declare the trusts for the intended beneficial takers*). AND I AUTHORISE my said trustees or trustee, at any time or times, either for the payment of any debts, or, at their or his discretion, for the benefit of the persons beneficially interested in my said real estates, (but, in the latter case, with the consent in writing of such (if any) of the persons beneficially interested for the time being as shall be of age), to sell and convert into money all or any part or parts of the said real estates. (*Discretionary powers*, (52 *i* [2]); *Power to partition among devisees* (75 *a*); *see* (52 *l* [4])).

power of sale for the payment of debts, or for distribution among the beneficial takers, so as to avoid the legacy duty. (*Vide ante*, p. 612, *n.*)

71 *g* [1]. I DEVISE all my freehold hereditaments at —— unto my brother, [*name*], during his life, without impeachment of waste; With remainder to his widow (*a*) during her life, [*or*, to his wife or wives successively during their respective lives], without impeachment of waste; With remainder to his children, as tenants in common in tail general; With cross-remainders as to shares both original and accrued in tail general between them; With remainder to my brother, [*name*], or, if he be dead at my decease, to such person or persons as shall be his heir at my decease, and his, her, or their heirs and assigns for ever.

Devise to brother for life, with remainder to his children as tenants in common in tail; —cross remainders;

71 *g* [2]. AND I EMPOWER my said brother, and after his decease his widow, from time to time to lease the said hereditaments for any absolute term or terms not exceeding twenty-one years in possession, at a rack-rent, subject to a condition for re-entry if the rent should be in arrear for twenty-one days. (*Or, substitute general power* (73 *k*)).

—leasing power.

71 *h*. I DEVISE all &c., to [*devisees*], their heirs and assigns for ever, as tenants in common. BUT, if either of the said [*devisees*] should be dead at my decease, or should afterwards die under the age of twenty-one years, without leaving issue

Devise to two as tenants in common in fee, with cross limitations on death under

(*a*) [The limitation to the widow is contingent during the brother's life; but no inconvenience seems likely to arise on account of such contingency. By limiting the remainders to the wives, they are made to vest on the marriage.]

twenty-one without issue.

living at his death, I DEVISE the share intended for him unto the other of them, his heirs and assigns for ever.

Devise to several as tenants in common in fee, with cross limitations on death under twenty-one without issue.

71 *i*. I DEVISE [*parcels*] to [*devisees*], their heirs and assigns for ever as tenants in common. BUT I DEVISE the share or shares (as well accrued as original) (*a*) of such of them as shall be dead at my decease, or shall die under the age of twenty-one years without leaving issue living at his, her, or their death or deaths, unto the others or other of them, their, his, or her heirs and assigns for ever, and if more than one as tenants in common.

Devise to several as tenants in common for life;

—remainder to trustees for sale for benefit of surviving issue of devisees for life, per stirpes;

71 *k*[1]. I DEVISE [*parcels*] to [*devisees*], during their respective lives, in equal shares as tenants in common; All such life estates to be without impeachment of waste. AND, after the decease of each of the said devisees for life, I DEVISE his or her share in the same hereditaments To SUCH USES as my said trustees or trustee for the time being shall, at any time or times within twenty-one years after the decease of the survivor of the said devisees for life, by deed appoint; And, subject thereto, To THE USE of the said [*trustees*], their heirs and assigns, UPON TRUST that my trustees or trustee for the time being will, after the decease of the survivor of the said devisees for life, sell the same hereditaments in such manner, and subject to such special or other conditions, as they or he shall deem expedient; With power to buy in, rescind, or vary any contract, and resell, and by their or his receipts in writing to discharge persons paying any purchase-monies from seeing to the application thereof; And to hold each such share of the said hereditaments and the clear produce of the sale thereof, IN TRUST for such child or children of the devisee for life of such share living at the decease of such devisee, and such issue then living of any previously deceased child or children of the same devisee for life as shall attain the age of twenty-one years or marry, if more than one in equal shares as between or among brothers and sisters, and his, her, or their

(*a*) [The gift over being of the shares of all who shall die under age without leaving issue, to the *others*, the words between parentheses may be thought unnecessary, and, indeed, are not strictly accurate. But such expressions have been construed to give the share of each one dying under age to *all* the others, without distinction, a gift which will not, in general, be extended to accrued shares. See *Barker* v. *Lea*, Turn. & R. 413; *Crowder* v. *Stone*, 3 Russ. 217. And in limitations of cross *remainders* in tail, the suggested construction of the word "others" would defeat the intention.]

executors, administrators, and assigns; But so that no child of any grandchild shall be included in this gift if such grandchild be then living; And that the child or the children collectively of any deceased child or grandchild shall take only such share as his, her, or their parent or parents would have taken if living. And as to the share or shares hereinbefore devised for life to any person who shall not leave any such issue to attain such age or marry, and the produce of such share, UPON TRUSTS corresponding with the uses and trusts herein limited of the other shares or share and the produce thereof (including the said life estates and this limitation). AND, if there should be no such issue, I DIRECT that the produce of the said hereditaments shall form part of my residuary personal estate. —ultimate gift;

71 *k*[2]. AND I DIRECT my trustees or trustee to invest any trust-monies not immediately payable in the funds or on mortgage; And to apply the rents or income from each minor's presumptive share under the above trusts towards his or her maintenance and education, and add the surplus to the capital of his or her share, with power to resort thereto for the maintenance and education of the person or persons presumptively entitled thereto. (*Advancement clause* (59 *a*[2]); *see* (75 *f*[4])). —investment; —maintenance.

71 *l*. PROVIDED ALWAYS, that, in case, under or on failure of any limitation contained in my will, my nephew, [*name*], would be entitled, either by purchase or descent, to any hereditaments for any estate or interest, then I DEVISE such hereditaments UNTO AND TO THE USE OF the said [*trustees*], their executors, administrators, and assigns, during the life of the said [*nephew*], IN TRUST for the person or persons who, for the time being, would be entitled to the same hereditaments in possession in case the said [*nephew*] were then dead, and had died without having disposed thereof in his lifetime or by will; AND from and after the decease of the said [*nephew*], if such estate or interest would be an estate or interest in fee-simple or fee-tail, then I DEVISE such hereditaments UNTO AND TO THE USE of such person or persons as would have inherited the same in case the said [*nephew*] had died seised of such estate or interest by purchase or descent (as the case may be), without having disposed of the same in his lifetime or by will, and for the like estate or estates; But so that such person or persons shall be deemed to take by purchase, and not by descent; AND if there should be no such person, TO THE USES herein limited after the failure of such estate or interest; Gift over in case A. B. would become entitled under the limitations in the will.

And if there be no such uses, or on failure thereof, To the use of [*name*] and the heirs of his body, With remainder To the use of [*name*] and the heirs of his body: It being my intention that the said [*nephew*] shall take no benefit under my will or by descent from me.

Devise of lands which may descend to testator from his brother, to the uses of the testator's marriage settlement.

71*m*. I devise such real estate as may come to me as heir or devisee of my brother, [*name*], to the trustees or trustee for the time being of my marriage settlement, To the uses and upon the trusts therein limited and declared concerning the freehold estates comprised therein.

Devise of farm, in trust for testator's three sons for life, with remainder to their children attaining twenty-one, or dying leaving issue;

71*n*. I give and devise [*parcels*] unto and to the use of the said [*trustees*] and their heirs for ever, Upon trust from time to time to pay the rents and profits thereof unto and equally among my sons [*three names*], as tenants in common, for their respective lives; And after their respective deceases, then Upon trust for such of the children of my said three sons respectively as have already attained or shall hereafter attain the age or respective ages of twenty-one years, or shall die under that age leaving lawful issue living at his, her, or their decease or respective deceases, and his, her, or their heirs and assigns for ever, if more than one as tenants in common; but so, nevertheless, that the respective child or children of each of my said three sons shall have his, her, or their parents' share or respective parents' shares only (*a*);

Remark on the scheme of disposition exemplified in the text.

(*a*) It will be observed, that the share of a son dying during minority leaving issue, does not go to such issue, but vests absolutely in the father, from whom it would in all probability descend to the surviving issue, or one of them, if consisting of more than a single individual.

In such gifts as the present, it is more simple and concise to vest the legal inheritance in trustees, giving the intended beneficiaries *equitable* interests only, than to attempt to carve out the legal inheritance among the latter, which would formerly have rendered it necessary to interpose a vested particular estate in remainder between the prior estate for life and the contingent remainder expectant thereon, in order to preserve such remainder from destruction.

As to limitations to preserve contingent remainders.

[The precaution of inserting limitations to trustees to preserve contingent remainders before the limitations of such remainders should still be observed, not only because the effect of the recent and obscure enactment of the 8th sect. of the stat. 8 & 9 Vict. c. 106, has not yet been settled, but because the circumstances under which that statute was passed have destroyed the reliance which was formerly placed on the good faith of the Legislature and its advisers. By a most beneficial and unexceptionably expressed enactment in a statute passed in the preceding year, (7 & 8 Vict. c. 76, s. 8), contingent remainders had been placed in all respects on the footing on which executory limitations,

And if any of my said three sons should die without having any child who shall survive me and shall attain the age of twenty-one years, or die under that age leaving lawful issue living at his or her decease, then, as to the share or respective shares, as well original as accruing, of such child or children respectively, upon such and the same trusts as are hereby limited and declared concerning the other or remaining undivided share or respective shares of the said hereditaments, or such of the same trusts as shall be then subsisting or capable of taking effect. (*Maintenance* (*b*) *&c.*, (59 *c*), *or* (71 *b*[3]); *see* (75 *f*)).

—cross limitations in trust.

71 *o*[1]. I GIVE AND DEVISE all those two messuages at ——, in the occupation of [*name*] and [*name*], UNTO AND TO THE USE of my said executors, their heirs and assigns for ever, UPON TRUST to pay the rents and profits thereof unto my daughters, [*name*], the wife of [*husband*], and [*name*], the wife of [*husband*], in equal shares, as tenants in common, during their respective lives, for their separate use, free from the control and debts of their present and any future husbands; and so that my said daughters respectively shall have no power to anticipate the same. And after the decease of my said daughters respectively,—

Devise in trust for two daughters for life, for their separate and inalienable use; and, after their decease, for their children attaining twenty-one or leaving issue;

71 *o*[2]. IN TRUST for such of the children of my said two daughters respectively (except my grandson, [*name*], for whom I have hereinafter otherwise provided), as have attained or shall hereafter attain the age or respective ages of twenty-one years, or shall die under that age leaving lawful issue living at his, her, or their deceases or respective deceases, and

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not being contingent remainders, have always stood; and, after the passing of that act, many limitations in deeds and wills were framed in reliance on its operation. This enactment, the Legislature, in the following year, acting on advice which was remarkable only for its recklessness, repealed *retrospectively* "as from the time of the commencement and taking effect thereof," (8 & 9 Vict. c. 106, s. 1); and enacted, (s. 8), that a contingent remainder, existing at any time after the 31st December, 1845, shall be and be deemed to have been "capable of taking effect, notwithstanding the determination by *forfeiture*, *surrender*, or *merger* of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened;" leaving contingent limitations, made on the faith of the repealed enactment, liable to failure by the regular determination of the preceding estate or estates of freehold before the happening of the contingency.]

(*b*) [Whenever real estate is limited to or in trust for minors, either contingently or otherwise, the trustees should be authorised to receive the rents and apply them for maintenance, &c. See (70 *o*[1])].

his, her, or their heirs and assigns for ever, if more than one as tenants in common; But so, nevertheless, that the child or children of each daughter shall take his, her, or their own parents' share only (*a*).

—specific devise to grandson in fee;

70 *o*[3]. I GIVE AND DEVISE [*parcels*] TO SUCH USES as my said [*grandson before excepted*] shall by deed or will appoint; And, subject thereto, TO THE USE of my said grandson, his heirs and assigns for ever.

—power to trustees to enter and apply rents for maintenance during minority.

70 *o*[4]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that during the minority of my said grandson, [*or*, of any person actually or presumptively entitled to any hereditaments or share of hereditaments under my will, but subject to any prior estate or interest therein,] it shall be lawful for my said trustees or trustee to receive the rents arising from the said hereditaments [or share] and apply the same for his [or her] maintenance and education, or, in the discretion of my trustees or trustee, pay the said rents to his [or her] parent or guardian, or either of his [or her] parents or guardians, to be so applied, without being bound to see to the application thereof, and without regard to the competence or ability of his [or her] parents or parent, if any, to provide such maintenance and education. AND I EMPOWER my trustees or trustee during such minority to let [or join in letting] the said hereditaments [or share] from year to year, or for any term not exceeding twenty-one years in possession, at rack-rent. (*See* (71 *q*[2])).

General devise and appointment;

71 *p*[1]. I GIVE, DEVISE, AND APPOINT all and singular the freehold and copyhold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, which I am seised of or in any manner entitled to or interested in, either in possession, reversion, remainder, or expectancy, or over which I have any power of appointment or disposition (except such hereditaments as are vested in me as trustee or mortgagee), to the uses, and subject to the powers and declarations hereinafter expressed; (that is to say),

—as to the messuage, &c., in his own occupation;

71 *p*[2]. AS TO ALL THAT my messuage or dwelling-house, with the gardens, lawn, pleasure-ground, and appurtenances thereto belonging, situate at ——, and now in my own occupation, TO THE USE of my said wife, [*name*], and her assigns, for

—to the use of

(*a*) Each daughter having several children, it was deemed unnecessary to add cross-limitations, as in the preceding form.

and during the term of her natural life, she keeping the same in good tenantable repair and order, and insuring the messuage and out-buildings from loss or damage by fire. AND, as to the same messuage and other premises from and immediately after the decease of my said wife, and as to all other the said freehold and copyhold hereditaments from and immediately after my own decease, To SUCH USES as my son, [*name*], shall, by any deed or deeds or by his last will and testament or any testamentary instrument, appoint, AND, in default of such appointment, and subject to any partial and incomplete appointment, To THE USE of my said son, [*name*], his heirs and assigns for ever.

his wife for life;

—and as to the same premises after her decease, and all his other lands after his own decease,

to such uses as testator's son shall appoint;

and in default, to son in fee;

71 p^3. PROVIDED ALWAYS, that if, at the time of the decease of the survivor of me and my said wife, as to the said hereditaments in my own occupation devised to her as aforesaid, or if, at the time of my decease, as to the residue of the said devised and appointed premises, my said son, [*name*], should be under the age of twenty-one years, then I EMPOWER AND DIRECT my said trustees or trustee for the time being to enter into and upon the said hereditaments and premises respectively, and receive the rents and profits thereof, and to apply and dispose of the said rents and profits, or such part thereof as my said trustees or trustee shall deem sufficient for the purpose, in and towards the maintenance and education of my said son, in aid of and addition to, but not by way of exoneration of, the fund hereinafter provided for such maintenance and education (*a*). AND I EMPOWER AND DIRECT my said trustees or trustee, from time to time, to invest the unapplied residue or surplus of the said rents and profits, in their or his own names or name, in the funds or on real securities, so as to form an accumulating fund, the principal of which fund, as well as the income thereof, shall, at the discretion of my said trustees or trustee, remain and be applicable, if occasion shall require, in and for the advancement or preferment of my said son during his minority; And I DIRECT AND DECLARE, that the said accumulated fund, or so much thereof as shall eventually remain unapplied to the purpose aforesaid, shall be paid and transferred to my said son, when and as soon as he shall attain the age of twenty-one years; And in the event

—power to trustees to enter during minority of son, and apply rents for maintenance.

(*a*) Where several funds are applicable for maintenance, and the destination of the unapplied income is different in regard to the several funds, the order or the proportion in which they are to be applied should be stated.

of his dying under that age, the same shall sink into and form part of my residuary personal estate.

Devise of lands to nephew in fee, with trusts for maintenance, &c., during his minority;

71 q^1. I DEVISE all my messuage and lands at ——, To SUCH USES as my nephew, [*name*], shall at any time or times after his majority by deed appoint; And, subject thereto, To THE USE of my said nephew, his heirs and assigns for ever.

—power of management, letting, &c., to trustees;

71 q^2. AND, during the minority of my said nephew, [*or*, of any person actually or presumptively entitled to any hereditaments or share of hereditaments under my will], I AUTHORISE my trustees or trustee to manage the said hereditaments, [or share], with power to let [or join in letting] the same from year to year, or for any absolute term or terms in possession not exceeding seven years, at a rack-rent, and to repair and insure any buildings thereon, and to receive the rents of the said hereditaments, [or share], and to adjust and settle accounts with tenants, And to apply all or a competent part of the clear income therefrom in the maintenance and education of my said nephew, [*or*, of such minor], And to invest the surplus (if any) thereof in the funds or on mortgage for his benefit, [*or*, to follow the destination of the said hereditaments or share]; With power from time to time to vary such investments, and to resort to such accumulations at any time for the maintenance, education, or advancement of my said nephew, [*or*, of the person or persons actually or presumptively entitled thereto]. (*See* (75 *f*)).

—gift over on his death under age.

71 q^3. BUT, in case my said nephew should die before me or under the age of twenty-one years, then I GIVE the said messuage and hereditaments, and also such accumulated income (if any), or so much thereof as shall not have been engaged for the benefit of my said nephew, unto my cousin, [*name*], his heirs, executors, administrators, and assigns.

Devise to testator's first and other sons successively and their male issue in strict settlement (*a*), with remainder—

72 a^1. I GIVE, DEVISE, AND APPOINT [*parcels*], and all other the real estates whatsoever and wheresoever, over which I shall have any disposing power at my decease (except trust and mortgage estates), To THE USES following: (that is to say,) To THE USE of my eldest son, [*name*], for his life without impeachment of waste; And, after his decease, To THE USE of his sons successively, according to their respective seniori-

(*a*) The limitations and powers in this form are framed with extreme conciseness. Examples of similar limitations and powers, more fully expressed, will be found in subsequent precedents.

ties, in tail male; And, for default of such issue, To THE USE of my son, [*second son*], for his life, without impeachment of waste; And, after his decease, To THE USE of his sons successively, according to their respective seniorities, in tail male; And, for default of such issue, To THE USE of my son, [*third son*], for his life, without impeachment of waste; And after his decease, To THE USE of his sons successively, according to their respective seniorities, in tail male; And, for default of such issue, To THE USE of my daughters, [*names*], during their respective lives, in equal shares as tenants in common, without impeachment of waste. And as to the respective shares therein of each of them my said daughters after her decease, To THE USE of her sons successively, according to their respective seniorities, in tail male; And on failure of the issue male of any one or more of my said daughters, then and so often as the same shall happen, as to as well the share or respective shares originally limited to the daughter or daughters whose issue shall so fail, as the share or respective shares which by virtue of this present clause shall have become vested in her or them or her or their issue male, To THE USE of the other or others of my said daughters during her or their life or respective lives, in equal shares as tenants in common, without impeachment of waste; And after the decease of any such last-mentioned daughter, then as to the share or shares lastly hereinbefore limited to her, To THE USE of her sons successively, according to their respective seniorities, in tail male; And if there should be a failure of such issue male of all my said daughters but one, then, as to the entirety of all the said estates, To THE USE of such only daughter for her life, without impeachment of waste; And, after her decease, To THE USE of her sons successively, according to their respective seniorities, in tail male (*a*); And, for default of such issue, To THE USE of my said several sons and daughters as tenants in common in tail general, with cross remainders between and among them in tail general; And if all my said children except one should die without issue, To THE USE of such only remaining child in tail general; And for default of such issue, To THE USE of my own right heirs for ever. PROVIDED AL-

to testator's daughters concurrently and their issue in strict settlement;

—cross remainders among the daughters and their issue. On failure of issue of all the daughters,

to testator's children concurrently in tail general, with cross remainders;

—ultimate remainder to testator's heirs;

(*a*) In this instance, it will be seen that the testator contents himself with giving estates in tail *male* to the *sons* of his children. More elaborate and comprehensive entailing limitations occur in subsequent forms.

—tenants in tail male born in testator's lifetime made tenants for life, with remainder to their issue in strict settlement;

WAYS, that if any person whom I have hereby made tenant in tail male of my said estates should be born in my lifetime, then and in every such case I REVOKE the devise and appointment so made to him, and in lieu thereof I GIVE, DEVISE, AND APPOINT the hereditaments comprised in such devise and appointment, To THE USE of the same person respectively for the term of his natural life, without impeachment of waste; And, after his decease, To THE USE of his sons successively, according to their respective seniorities in tail male (*a*).

—general devise to trustees to preserve contingent remainders;

72 *a*[2]. AND for the purpose of preserving the contingent remainders hereinbefore created from being destroyed, I GIVE, DEVISE, AND APPOINT the hereditaments hereby limited to any person during the term of his or her natural life, immediately after the determination of that estate by forfeiture or otherwise, UNTO AND TO THE USE of [*trustees*], their executors or administrators, during the life of the tenant for life whose estate shall so determine, IN TRUST for him or her, and by the usual means to preserve the contingent remainders expectant or depending thereupon from being destroyed (*b*).

—power to apply adequate part of income during minority to maintenance;

72 *a*[3]. PROVIDED ALWAYS, AND I HEREBY DIRECT, that if any person for the time being entitled to the actual possession or to the receipt of the rents and profits of the estates hereinbefore devised and appointed respectively, should then be under the age of twenty-one years and unmarried, the said [*trustees*] and the survivor of them, and the executors or administrators of such survivor, shall, so long as the person entitled as aforesaid shall be under the age of twenty-one

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As to clause reducing the estates of tenants in tail born in testator's lifetime to estates for life.

(*a*) The testator, having made his existing sons tenants for life, with remainder to their first and other sons in tail, has carried into effect his entail scheme, so far as was consistent with circumstances existing at the time of the execution of his will. If, at that period, any of his sons had had issue, he would have devised to such issue estates for life, with remainder to their sons in tail; and the object of the present clause is, to accomplish this purpose in the event of any of the testator's children having issue in his lifetime. It will be observed, that the limitations do not contemplate or provide for any addition occurring to the number of the testator's own children in his lifetime.

Trusts to preserve contingent remainders.

(*b*) This is a short mode of avoiding the necessity of interposing an estate for preserving contingent remainders in each instance. [The usual limitations to trustees to preserve contingent remainders are retained in these forms, because the operation of the 8th section of the statute 8 & 9 Vict. c. 106, is not very intelligible, and also because that statute contains a lesson against dispensing with any precautionary provisions on the faith of an act of Parliament. (See p. 824, n.)]

years and unmarried, enter into and receive the rents and profits of the said estates, and apply such part thereof as they or he shall think proper for the maintenance and education of such person respectively; or, in the discretion of the said [*trustees*] or the survivor of them, or the executors or administrators of such survivor, shall pay the same to the guardian or guardians of such minor for the purpose of being so applied; And shall invest the residue or surplus in the names or name of the said [*trustees*] or the survivor of them, or the executors or administrators of such survivor, in the funds or on real securities, so that the same and the resulting income thereof may accumulate in the nature of compound interest;

—and accumulate residue;

72 *a*[4]. And at the end of each such period of accumulation, or sooner if they or he think proper, shall call in and convert into money the said accumulated fund, and lay out and invest the same in the purchase of freehold, leasehold, or copyhold estates, to be situate in England or Wales, And shall settle the lands so to be purchased to the uses and in the manner to and in which I have hereinbefore limited the estates from the rents of which such accumulations shall have proceeded; But if any such investments should be made during the continuance of the period of accumulation, the rents and profits of the estates so to be purchased shall, to the end of the period of accumulation, be accumulated in the manner and for the purposes hereinbefore mentioned. NEVERTHELESS, I HEREBY DECLARE, that the said trust for accumulation shall not in any case extend beyond the period of twenty-one years computed from the day of my decease.

—accumulations to be laid out on land;

72 *a*[5]. PROVIDED NEVERTHELESS, AND I FURTHER DECLARE, that if, during any such minority as aforesaid, the said hereditaments hereinbefore devised and appointed respectively be subject to any mortgage or mortgages, whether created under the power hereinafter contained or otherwise, it shall be lawful for the said [*trustees*] or the survivor of them or the executors or administrators of such survivor, and they and he are and is hereby directed, to apply the whole or any part of the fund or funds to be accumulated as aforesaid in or towards payment and satisfaction of such mortgage debt or mortgage debts.

—mortgage debts to be liquidated out of accumulated fund;

72 *a*[6]. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said sons respectively, and any and every other male person, who by virtue of this my will shall become entitled to the actual possession or to the actual re-

—power to male tenants for life, (who shall become entitled in possession), to

charge estate with jointure and portions.

ceipt of the rents and profits of the said real estates hereinbefore devised and appointed respectively, either before or after they respectively shall become so entitled, and either before or after marriage, by deed or will to charge the whole or any part of the said estates with the payment of any annual sum, not exceeding £——, to any woman with whom they may respectively marry, for the term of her natural life, to be payable quarterly or half-yearly without any deduction, with usual powers of distress and entry and detention of possession and perception of rents; And also to limit the hereditaments so to be charged to trustees for any term or terms of years, upon the usual trusts for securing the payment of the said annual sum, and also to charge the last-mentioned hereditaments, or any part or parts thereof, with any sum of money not exceeding in the whole the sum of £——, for the portion or portions of any of their respective children other than and besides an eldest or only son for the time being entitled to the said estates for an estate in tail male in possession, or in remainder expectant upon the decease of his parent exercising the said power, and to appoint the hereditaments so to be charged to any person or persons for a term of years, In TRUST to raise the portion or portions so to be charged (*a*). (*Add powers to grant husbandry and building or mining leases* (73 *e*), (73 *f*); *to sell and exchange, and give receipts and to invest purchase-moneys* (74 *a*[1]), *&c. Trustee clauses* (80 *a*[1]), *&c.*).

Devise of freeholds;

72 *b*[1]. I GIVE AND DEVISE [*parcels*], and all other the freehold messuages, lands, tenements, and hereditaments whatsoever, whether in possession, reversion, remainder, or expectancy, over which I shall have at my decease any power of disposition, (except such estates as are vested in me as mortgagee or trustee), To THE USES, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, and declarations hereinafter expressed concerning the same, (that is to say),

—to the intent that testator's wife may receive a rent-charge of £—— during life;

72 *b*[2]. To THE USE, INTENT, AND PURPOSE, that my said wife, [*name*], or her assigns, in case she should survive me, shall and may receive and take during her natural life one annual sum or yearly rent-charge of £—— of lawful British money, to be charged upon and issuing out of the freehold heredita-

(*a*) Here no limit is fixed on the aggregate amount of the charges to be existing at the same time, as in subsequent forms.

ments hereinbefore devised, and to be paid at or in the —— of ——, in the county of ——, by equal quarterly payments, on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, in every year, without any deduction whatsoever on account of present or future taxes, or of any other matter, cause, or thing whatsoever; the first quarterly payment of the said yearly rent-charge to be made on such of the said days of payment as shall happen next after my decease, if my said wife should be then living; and a proportional sum to be paid to the executors, administrators, or assigns of my said wife immediately after her decease, for and in respect of any fractional part of a quarter of a year which may at her decease have elapsed from the last preceding day of quarterly payment, or, if no such day should have arrived, from the day of my decease; such proportional sum to be considered as part of the said annual sum or yearly rent-charge of £——, and to be recoverable in the same manner as is herein directed concerning the arrears of the said annual sum or yearly rent-charge. AND TO THE FURTHER USE, INTENT, AND PURPOSE, that when and so often as the said annual sum or yearly rent-charge of £——, or any part thereof respectively, shall at any time or times be unpaid by the space of —— days next after any of the days hereinbefore appointed for the payment thereof, then, and in every such case, it shall be lawful for my said wife, her executors, administrators, or assigns, to enter into and distrain upon the hereditaments hereinbefore devised, or any part thereof, and to dispose of the distress and distresses then and there found according to law, to the intent that thereby or otherwise the said annual sum or yearly rent-charge of £——, and every part thereof so in arrear, and all expenses occasioned by the nonpayment thereof, may be fully satisfied. AND TO THE FURTHER USE, INTENT, AND PURPOSE, that when and so often as the said annual sum or yearly rent-charge of £——, or any part thereof, shall at any time or times be unpaid by the space of —— days next after any of the days hereinbefore appointed for the payment thereof, then and in every such case (although there shall not have been any legal demand made thereof)(*a*), it shall be lawful for my said wife, her executors, administrators, or assigns, to enter into and

to be payable quarterly;

—power to distrain;

—power to enter;

(*a*) The words dispensing with the demand are unnecessary: *Doe* v. *Horsley*, 3 Nev. & Man. 567.

upon and hold the said hereditaments hereinbefore devised, or any part thereof, and to receive the rents and profits thereof, for her or their own use, until she or they shall thereby or therewith or otherwise be fully satisfied the said annual sum or yearly rent-charge of £——, and the arrears thereof due at the time of such entry, or afterwards to become due during her or their being in possession of the same premises, together with all expenses which she or they shall sustain by reason of the nonpayment thereof; and such possession when taken to be without impeachment of waste.

—to the further intent that testator's wife may receive an additional rent-charge of £—— during widowhood,

72 *b*[3]. And to the further use, intent, and purpose, that my said wife or her assigns, in case she should survive me, shall and may, during so long as she shall continue my widow and unmarried after my decease, receive the further annual sum or yearly rent-charge of £—— of like lawful British money, to be charged upon and issuing out of the said hereditaments hereinbefore devised, and to be paid quarterly at the place and on or at the days or times, and without deduction for present or future taxes, and otherwise in such manner as is hereinbefore mentioned and appointed for the payment of the said annual sum or yearly rent-charge of £——; the first quarterly payment of the said annual sum or yearly rent-charge of £—— to be made on such of the said quarterly days of payment as shall happen next after my decease, in case my wife should be then living and should continue my widow; and a proportional sum to be paid to the executors, administrators, or assigns of my said wife immediately after her decease, in case she should have continued my widow to the time of her decease, for and in respect of any fractional part of a quarter of a year which may at her decease have elapsed from the last preceding day of quarterly payment, or, if no such day should have arrived, from the day of my decease; such proportional sum to be considered as part of the said annual sum or yearly rent-charge of £——, and to be recoverable in the same manner as is herein directed concerning the arrears of the said annual sum or yearly rent-charge of £——.

with a like power to distrain,

And to the further use, intent, and purpose, that when and so often as the said annual sum or yearly rent-charge of £——, or any part thereof, shall be unpaid by the space of —— days next after any of the days hereinbefore appointed for the payment thereof, then and in every such case my said wife, her executors, administrators, or assigns, shall and may, for the recovery thereof and of all expenses

occasioned by the nonpayment thereof, have and enjoy such and the like powers of distraining upon all or any of the hereditaments hereby charged with the payment of the same as are hereinbefore limited to and provided for her my said wife and her assigns, for enabling her and them to recover and enforce the payment of the said annual sum or yearly rent-charge of £——, and the expenses to be occasioned by the nonpayment thereof. And also, that when and so often as the said annual sum or yearly rent-charge of £——, or any part thereof, shall be in arrear or unpaid by the space of —— days next after any of the days hereinbefore appointed for payment of the same, then and in every such case my said wife and her assigns shall and may, for compelling payment and obtaining satisfaction of the same, together with such expenses as aforesaid, have and enjoy such and the like powers of entering upon and detaining the possession, and receiving and taking the rents and profits of all or any of the said hereditaments charged with the payment of the same as hereinbefore are limited to or for her my said wife and her assigns, for enabling her and them to recover payment and obtain satisfaction of and for the said annual sum or yearly rent-charge of £——, and the expenses occasioned by the nonpayment thereof (*a*).

and to enter;

72 *b*[4]. And as to, for, and concerning all and singular the said freehold hereditaments hereinbefore devised, subject and charged as aforesaid, To the use of my only son, [*name*], and his assigns, during his life, without impeachment of waste; And immediately after the determination of that estate by forfeiture or otherwise in his lifetime, To the use of the said [*trustees*], and their executors or administrators, during the life of my said son, Upon trust, by the usual ways and means, to preserve the contingent remainders hereinafter limited from being defeated or destroyed, but to permit and suffer my said son and his assigns during his life to receive the rents and profits of the said hereditaments for his and their proper use and benefit; And from and immediately after the deccase of my said son, To the use of the first and every other son of my said son, [*name*], successively, and the heirs male of the body of every such son; And in default of such issue, To the use

—subject to rent-charge, devise of freeholds to testator's only son for his life; remainder,

to trustees to preserve; remainder,

to first and other sons of testator's son in tail male; remainder,

(*a*) As to the omission of a term of years to secure the rent-charges, vide ante, p. 490.

of each of my other sons during his life, without impeachment of waste; And after his decease, To THE USE of the first and every other son successively of each such other son, and the heirs male of the body of such first and every other son; so that the elder of my said other sons and his first and other sons and their respective heirs male successively may be preferred to and take before the younger of my said other sons and his and their first and other sons and their respective heirs male; And after the determination of the estate for life of each of my said other sons by forfeiture or otherwise in his lifetime, To THE USE of the said [*trustees*], and their executors or administrators, during the life of such son, UPON TRUST, by the ways and means aforesaid, to preserve the contingent remainders expectant upon his life estate from being defeated or destroyed, but to permit such son and his assigns during his life to receive the rents and profits of the said hereditaments for his and their proper use and benefit; And after the determination or failure of the several estates hereinbefore limited as aforesaid,

to each of testator's other sons for life, and to their sons successively in tail male;

—so that the elder of such sons and his sons be preferred to the younger and their sons; remainder,

to trustees to preserve; remainder,

72 *b*[5]. To THE USE of the first and every other son of my said son, [*name*], successively, and the heirs of the body of every such son; with remainder, To THE USE of the first and every other daughter of the said [*son*], successively, and the heirs of the body of every such daughter; with remainder, To THE USE of the first and every other son successively of the second and every other subsequently born son of my body, and the heirs of the body of every such son; with remainder, To THE USE of the first and every other daughter successively of the second and every other subsequently born son of my body, and the heirs of the body of every such son (*a*), so that the first and every other son, and the first and every

—to sons of testator's first son successively in tail general; remainder,

to daughters of testator's first son successively in tail general; remainder,

to first and other sons; remainder to first and other daughters in tail general of testator's second and other sons;

As to the order in which the several stocks or classes of issue are admitted.

(*a*) The limitations in the text admit the several stocks and classes of issue in the following order, namely, the testator's eldest son and his first and other sons, the latter taking estates in tail *male;* next, the younger sons and their sons, the latter also taking estates in tail *male;* next, the sons and daughters in succession of the testator's eldest son take estates tail *general;* next, the sons and daughters also in succession of the testator's younger sons take estates tail *general;* next are admitted the eldest and other daughters of the testator and their first and other sons, the latter taking estates in tail *general;* and, lastly, the first and other daughters of testator's *daughters* take estates in tail *general.* These limitations embrace the whole line of the testator's descendants.

other daughter of the elder of my said second and other subsequently born sons, as tenants in tail general as aforesaid, may take before and be preferred to the first and other sons in tail general and the first and other daughters in tail general of the younger of my said second and other subsequently born sons; And after the determination or failure of the several estates hereinbefore limited as aforesaid,

in default of such issue,

72 *b*[6]. To THE USE of the said [*trustees*], and their executors or administrators, during the life of my daughter, [*name*], UPON TRUST to preserve the contingent remainders hereinafter limited, and also UPON TRUST that the said [*trustees*], their executors or administrators, will and shall, during the life of my said daughter, pay the yearly rents and profits of the said hereditaments into the proper hands of my said daughter, for her sole and separate use and benefit, free from the control, debts, and engagements of any husband, And so that she may not have power to alienate, dispose of, engage, or receive the same or any part thereof by way of anticipation; And from and after the decease of my said daughter, To THE USE of the first and every other son of my said daughter successively, and the heirs male of the body of every such son; with remainder, To THE USE of the first and every other son of my said daughter successively, and the heirs of the body of every such son; with remainder, To THE USE of the first and every other daughter of my said daughter successively, and the heirs of the body of every such daughter; with remainder, To THE USE of the said [*trustees*], and their executors or administrators, during the life of each of my other daughters, UPON TRUST to preserve the contingent remainders hereinafter limited; and also UPON TRUST, that the said [*trustees*], their executors or administrators, will and shall, during the life of such daughter, pay the yearly rents and profits of the said hereditaments into the proper hands of such daughter for her sole and separate use and benefit, free from the control, debts, and engagements of any husband, and so that she may not have power to alienate, dispose of, engage, or receive the same or any part thereof by way of anticipation. And from and after the decease of each such daughter respectively, To THE USE of her first and every other son successively, and the heirs male of the body of every such son; with remainder, To THE USE of the first and every other son successively of each such daughter, and

to trustees during the life of testator's daughter, to preserve, and for her separate and inalienable use;

—after her decease, to her first and other sons in tail male; remainder,

to her first and other sons in tail general; remainder,

to her first and other daughters in tail general; remainder,

to trustees during the life of each of testator's other daughters successively to preserve, and for their separate and inalienable use;

—and after the decease of each such daughter, to her first and other sons in tail male; remainder,

the heirs of the body of every such son; with remainder, To THE USE of her first and every other daughter successively, and the heirs of the body of every such daughter; so that the estate hereinbefore limited to the said trustees, and their executors or administrators, during the life of the elder of my second and other subsequently born daughters, and to her first and other sons successively in tail male, and to her first and other sons successively in tail general, and to her first and other daughters successively in tail general, shall have precedence to and take effect before the estates limited to the said trustees, and their executors or administrators, during the life and lives of the younger of my second and other subsequently born daughters, and her and their first and other sons successively in tail male, and her and their first and other sons successively in tail general, and her and their first and other daughters successively in tail general.

to her first and other sons in tail general; remainder,

to her first and other daughters in tail general; remainder,

72 *b*[7]. AND from and after the determination or failure of the several estates hereinbefore limited as aforesaid To SUCH USES as the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being acting in their or his place, shall at any time or times before the expiration of twenty-one years from the death of such survivor by any deed or deeds appoint, and subject thereto, To THE USE of the said [*trustees*], and their heirs and assigns for ever, upon the trusts hereinafter declared of or concerning the same, (that is to say), UPON TRUST, that they the said [*trustees*], or the survivors or survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being acting in their or his place, will and shall (subject and without prejudice to the several yearly rent-charges hereinbefore limited, or such as for the time being shall be subsisting) by mortgage or sale of all or any part of the said hereditaments hereinbefore devised, or by any other reasonable ways or means, levy and raise the sum of £—— of lawful British money, with interest for the same after the rate of £4 per centum per annum, computed from the time of such determination or failure of the said several estates hereinbefore limited as aforesaid, and pay and divide the same sum of £—— and interest, unto, between, and amongst the daughter or daughters of my niece, [*name*], now residing at ——, (if any), who shall be then living, if more than one in equal shares; And

to the use of trustees in fee, Upon trust to raise £—— by mortgage or sale,

and divide same among the daughters of testator's niece;

as to the said hereditaments (subject to and charged with the payment of the said sum of £—— and interest), IN TRUST for [*names*], their heirs and assigns for ever, as tenants in common.

—ultimate trust for collateral relations;

72 *b* [8]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that during the minority of my said son, [*name*], and during the minority or respective minorities of any other of my sons or more remote descendants, being males, who, under the limitations hereinbefore contained, shall come into the actual possession of or be entitled to the receipt of the rents and profits of the said hereditaments hereinbefore devised, and during the minority and discoverture or respective minorities and discovertures of any of my daughters or more remote descendants, being females, who, under the said limitations, shall come into the actual possession of or be entitled to the receipt of the said rents and profits, it shall be lawful for the said trustees or trustee for the time being, (but subject and without prejudice to the several rent-charges hereinbefore limited, or such of them as shall be subsisting), during every such minority, or minority and discoverture, as the case may be, to receive the rents and profits of the said hereditaments, or of such part thereof as such minor or minors may happen to be entitled to therein, and to apply an adequate part of such rents and profits, in their or his discretion, in the maintenance, education, or advancement of my said son, [*name*], or of such others of my sons or daughters or issue as shall for the time being, under the limitations aforesaid, be in the actual possession, or be entitled to the rents and profits of the same hereditaments, or, in the discretion of the said trustees or trustee, to pay such rents and profits, or an adequate part thereof, as aforesaid, to the guardian or guardians for the time being of the said minor or minors respectively, to be applied for such maintenance, education, and advancement as aforesaid, without any obligation on the part of my said trustees or trustee to see to the application thereof; And from time to time to lay out and invest the surplus or residue of the said rents and profits in their or his names or name in the public stocks or funds of Great Britain, or at interest upon real security in England or Wales, and to receive the annual produce and income of the last-mentioned stocks, funds, and securities, and lay out and invest the same in or upon other stocks, funds, or securities of the like nature, (the said trustees or trustee altering, varying, and

—power to trustees during minorities to apply part of the rents for maintenance, and to accumulate residue,

transposing the said stocks, funds, and securities from time to time as they or he shall think fit), and from time to time to repeat such investments, so that all the resulting income and produce for the time being may, during every such minority, or minority and discoverture, as aforesaid, accumulate in the way of compound interest; And at the end of every such period of accumulation, or sooner if deemed expedient, to convert the said accumulated fund into money, and lay out or invest the money arising thereby in the purchase of freehold or copyhold estates of inheritance in England. (*See* (75 *f*)).

and invest such accumulations in purchases, to be settled to the same uses;

72 *b* [9]. And I direct and declare, that the estates so to be purchased as aforesaid shall be assured and settled To the uses, upon the trusts, for the intents and purposes, and with, under, and subject to the powers, provisoes, and declarations hereinbefore expressed concerning the said hereditaments hereinbefore devised, or as near thereto as the nature or quality of the property and intervening circumstances will then admit of.

72 *b* [10]. Provided nevertheless, and I hereby direct and declare, that the trust or direction hereinbefore contained concerning the accumulation of the surplus of the rents and profits arising from the said hereditaments hereinbefore devised shall not continue or endure beyond the period of twenty-one years computed from the day of my decease; And that, from and after the expiration of the said term of twenty-one years, the whole of the residue or surplus of such rents and profits which shall remain unapplied to such maintenance, education, and advancement as aforesaid, shall go and belong to the person or persons during whose minority or respective minorities, or minority and discoverture or respective minorities and discovertures, as the case may be, the same shall have arisen as aforesaid, in like manner as the same would have gone and been applicable if the said trust for accumulation had not been contained or inserted in my will.

—accumulating trust restrained to twenty-one years from testator's decease;

72 *b* [11]. Provided always, and I hereby declare, that it shall be lawful for each and every son of mine, [who, by virtue of the limitations hereinbefore contained, shall for the time being be in the actual possession of or entitled to the receipt of the rents and profits of the hereditaments hereby devised, at any time or times, or from time to time, either before or after marriage, (but subject and without prejudice to the several rent-charges hereinbefore created, or such of

—power for sons, when in possession, to jointure;

them as shall be subsisting),] [*or*, whether such son shall or shall not eventually become entitled to the actual possession or the receipt of the rents and profits of the hereditaments hereinbefore devised, (but subject and without prejudice to the estates, charges, and powers antecedent to the estate for the life of such son),] [*or*, who (or any of whose issue) (as the case may be) shall, by virtue of the limitations hereinbefore contained, become entitled to the actual possession or the receipt of the rents and profits of the freehold hereditaments hereinbefore devised, either before or after he shall so become entitled (but subject and without prejudice to the estates, charges, and powers antecedent to the estate for life of such son),] (*a*), by any deed or deeds, revocable or irrevocable, to

—variation where the jointuring power is exercisable by tenants for life not in possession, and who never become entitled in possession,

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(*a*) It is usual to confine jointuring powers to tenants for life in actual possession; hence it happens that such a remainder-man for life is unable to secure an absolute provision by way of jointure to an intended wife, as any such jointure would not take effect unless he lived to become entitled in possession. The restriction, indeed, even precludes a remainder-man, whose estate does eventually take effect in possession, from previously making an effectual legal jointure; but the intended husband in such case might make a good jointure in equity, by way of covenant, which a Court of equity would compel him to perform, and, if he died (after having become entitled in possession) without perfecting the jointure, would make good the appointment against the persons entitled in remainder. See Sugd. Pow., 5th ed., 373. The power clearly ought to be exercisable as well before as after the remainder vests in possession, and should even, it is conceived, be independent of the contingency of the donee coming into possession at all; for, suppose that lands are limited to A. for life, with remainder to his issue in strict settlement, with remainder to B. and his issue in like manner, with remainder to C. and his issue in like manner; during the life of A., B. marries, and afterwards dies, leaving his wife and issue inheritable under his remainder in tail; A. afterwards dies without issue: upon which the eldest son of B., the deceased remainder-man, becomes entitled as tenant in tail in possession, free, of course, (if the jointuring power was restricted to tenants for life *in possession*), from any jointure to his mother. But why, it may be asked, should the accident of the donee having died before his remainder fell into possession deprive his widow of her jointure? Such a restriction detracts greatly from the value of the power.

As to extending jointuring powers to persons not in possession.

Though, in our supposititious case, B. is made to leave issue by his surviving wife, yet even this circumstance does not seem properly to constitute an essential ingredient. The appointed jointure should override *all* the estates posterior to the estate for life of the donee without distinction, though such donee not only should not have been entitled in possession when he exercises the power, but should never afterwards

be attested by one or more witness or witnesses, or by his last will (*a*) and testament, or any testamentary writing, to limit and appoint, To THE USE of or IN TRUST for any and every wife whom such son shall have married or shall or may thereafter marry, for her life and for her jointure and in bar or without being in bar of dower, any annual sum or sums of money or yearly rent-charge or charges, not exceeding in the whole the yearly sum of £—— of lawful British money, to be issuing out of and charged upon all or any of the said hereditaments, clear of all present or future taxes and outgoings whatsoever, and to be paid in such manner as to such son shall seem meet;

with the usual powers of distress and entry;

And, for the purpose of securing the annual sum or yearly rent-charge or annual sums or yearly rent-charges so to be appointed as aforesaid, to limit and appoint the usual powers and remedies for recovering and enforcing payment thereof respectively by distress and entry upon and perception of the rents and profits of the said hereditaments so to be charged with the said annual sum or yearly rent-charge or annual sums or yearly rent-charges; And also to limit and appoint the hereditaments so to be charged as aforesaid, (but subject and without prejudice as aforesaid), to any person or persons whomsoever, for any term or terms of years, as to the person exercising this present power shall seem meet; [But so that any and every such term of years (if any such should be limited) be made to determine on the death of the woman for the benefit of whom the same shall be created, and the payment of the arrears of her rent-charge or rent-charges, and the expenses incurred by the nonpayment thereof respectively (*b*).]

—and also to create terms of years for securing jointures;

—proviso

72 *b* [12]. PROVIDED, NEVERTHELESS, AND I HEREBY DECLARE,

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become so entitled; care, of course, being taken that it is not made to affect any estate antecedent to his own, to guard against which possibly may have been originally the motive for confining the power to tenants for life in possession, though it is obvious that the protection of the prior estates did not require such an inconvenient restriction on the power. It is only necessary for this purpose, that the appointed jointure should be prevented from taking effect in possession, unless in the same events as those in which the donee's own estate would so take effect.

(*a*) Powers to jointure are often restricted to appointments *by deed*, but they clearly ought to be made exercisable *by will* also.

(*b*) [This proviso for cesser is now unnecessary. See stat. 8 & 9 Vict. c. 112.]

[that no jointure or jointures to be created or appointed by virtue of this present power shall take effect in possession, unless the person exercising such power shall actually become entitled in possession to the said hereditaments hereby devised by virtue of the limitations hereinbefore contained, or would, if he had been living, have become so entitled. PROVIDED ALSO, AND I FURTHER DECLARE,] that the said hereditaments hereby devised shall not, under or by virtue of the power of jointuring hereinbefore contained, be at any one time subject or liable to the payment of any jointure or jointures exceeding in the whole the annual sum of £——, so that if, by virtue or means of the aforesaid power of jointuring, the same hereditaments, or any part or parts thereof, would, in case this present proviso had not been inserted, be charged with a greater annual sum for jointures in the whole than £——, the payment of the annual sum occasioning such excess, or such part thereof as occasions the same, shall, during the time of such excess, be suspended.

where power is exercisable by persons not in possession;

—proviso limiting the amount of jointures in the whole to a given sum;

72 *b*[13]. PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that it shall be lawful for each and every daughter of mine, [who, by virtue of the limitations hereinbefore contained, shall for the time being be beneficially entitled to the possession or to the receipt of the rents and profits of the hereditaments hereby devised as aforesaid,] at any time or times and from time to time, whether sole or covert, by any deed or deeds, revocable or irrevocable, to be attested by one or more witness or witnesses, or by her last will and testament, or any testamentary writing (but subject and without prejudice as aforesaid), to limit and appoint the said hereditaments, or any part thereof, to the use of or in trust for any and every husband whom such daughter shall have married or shall or may thereafter marry, for his life, or any yearly rent-charge or charges issuing out of the said hereditaments, to be paid in such manner during the life of such husband as to such daughter of mine shall seem meet, with such powers and remedies for recovering and enforcing payment thereof as are hereby authorised to be created by the power of jointuring hereinbefore contained; But so nevertheless, and I hereby expressly declare, that no estate or rent-charge to be created and limited by virtue of this present power shall take effect in possession until the decease of the daughter exercising the same, [*if the power is not limited to persons in*

—power to daughters in possession to limit life estates or rent-charges to husbands;

—variation where power is exercisable by persons not in possession;

possession, add, nor unless such daughter shall become actually entitled in possession to the said hereditaments hereby devised by virtue of the limitations aforesaid, or would, if she were living, have become so entitled.]

—power to sons and daughters in possession to charge with portions for younger children;

72 *b*[14]. PROVIDED ALSO, AND I HEREBY FURTHER DECLARE, that it shall be lawful for each and every son and daughter of mine, who, by virtue of the limitations hereinbefore contained, shall for the time being be in the actual possession of or beneficially entitled to the receipt of the rents and profits of the said hereditaments hereinbefore devised (*a*), (any such daughter being either covert or sole), by any deed or deeds, revocable or irrevocable, to be attested by one or more witness or witnesses, or by his or her respective last will and testament, or any testamentary writing, (but subject and without prejudice as lastly hereinbefore is mentioned), to subject or charge all or any part of the said hereditaments hereinbefore devised to or with the payment of any sum or sums of money for the portion or portions of all or any child or children of the person for the time being exercising this present power (other than or besides an eldest or only son for the time being entitled under the limitations hereinbefore contained to the said hereditaments for an estate in tail male in possession or in remainder expectant on the decease of his parent), not exceeding in the whole the sum or sums of money hereinafter mentioned, (that is to say), if such person should have no son who shall attain the age of twenty-one years, or die under that age leaving issue male living at his decease, then with any sum or sums of money not exceeding £—— a piece for the portion or portions of his or her daughter or daughters respectively; but if such person should have a son who shall attain the age of twenty-years, or die under that age leaving issue male of his body living at his decease, then with any sum or sums of money not exceeding £—— (*b*) a piece for the portion or portions of his or her daughter or daughters, and younger son or younger

—the amount to be regulated by the number of children;

(*a*) The observations before made (ante, p. 841) as to the power of jointuring apply to the power to charge portions; the phraseology of which may be varied as the first-mentioned power is varied. As to making the power exercisable in favour of adult or married children only, see p. 865, n.

(*b*) The amount, of course, is reduced in this event.

sons respectively with interest for the same sum or sums of money respectively at any rate not exceeding £4 per centum per annum, to be paid to or shared and divided between or among such child or children or any one or more of them, at such age, day, or time, or respective ages, days, or times, and with such provisions for maintenance and advancement in the meantime, and if more than one in such shares and proportions and with such annual sum or sums of money, conditions, restrictions, and limitations over (such annual sum or sums of money and limitations over being for the benefit of one or more such child or children respectively), as to the person making each such charge respectively shall seem meet: AND THAT, for the purpose of raising such portion or portions and interest on the same respectively, it shall be lawful for the person making each or any such charge as lastly hereinbefore is mentioned, by the same or any other deed or deeds so attested as aforesaid, or by such last will and testament or testamentary writing, to limit and appoint (but subject and without prejudice as lastly hereinbefore is mentioned) all or any part of the hereditaments so to be charged as lastly hereinbefore is mentioned to any person or persons whomsoever, for any term or terms of years whatsoever, without impeachment of waste, UPON TRUST to raise the money so to be charged by way of mortgage; so that the estate or estates so to be created be made to cease or be redeemable on full payment of the sum or sums of money so to be charged, and the interest thereof, by the person or persons who for the time being shall be entitled to the freehold and inheritance of the premises so to be limited and appointed. PROVIDED ALSO, AND I HEREBY DECLARE, that the said hereditaments shall not, under or by virtue of the power hereinbefore in that behalf contained, be liable to the payment of any larger sum or sums of money for portions than the sum of £—— in the whole. (*Add powers to tenants for life to lease,* (73 *e*), (73*f*); *to grant licenses to devise copyholds,* (73 *n* [3]); *to sell and exchange, to enfranchise copyholds, to join in partitions, directions for investments &c.,* (74 *a* [1]), *&c.; Devise of copyholds to uses of freeholds,* (76 *a*); *Trustee clauses,* (80 *a* [1]), *&c.*)

—and to limit the devised lands for any terms of years, upon trust to raise the portions by sale or mortgage;

—proviso limiting the amount of portions in the whole to a given sum.

72 *c* [1]. I GIVE AND DEVISE all that my manor or lordship of ——, and all other the manors or lordships, messuages, farms,

Devise of testator's estates in the county of York,

lands, tenements, and hereditaments whatsoever in the county of York, comprised in my marriage settlement bearing date on or about the —— day of ——, and all other the manors or lordships, messuages, farms, lands, tenements, and hereditaments in the said county of York, of or to which [at the date of this my will] I or any person or persons IN TRUST for me, am, is, or are seised or entitled for any estate of freehold or inheritance in possession, reversion, remainder, or expectancy, or otherwise howsoever, or which [at the date of this my will] I have power to dispose of or appoint by my will, with their appurtenances, and all my estate and interest therein (subject as to such of the said manors and other hereditaments as are comprised in a certain term of —— years, created by my said marriage settlement, and thereby limited to [*trustee*], of ——, his executors, administrators, and assigns, to the payment of the sum of £—— thereby secured or provided for my sister, [*name*], as her portion), to the uses following (that is to say),

to the use of trustees for a term of —— years, and subject thereto,

72 c^2. TO THE USE of [*trustees of term*], their executors, administrators, and assigns, for the term of —— years, to commence and be computed from the day of my decease, and thenceforth next ensuing and fully to be complete and ended, without impeachment of or for any manner of waste, upon and for the trusts, intents, and purposes, and subject to the powers, provisoes, and declarations hereinafter expressed concerning the same; And after the expiration or sooner determination of the said term of —— years, and in the meantime subject thereto and to the trusts thereof,

to testator's elder daughter for life; remainder,

to trustees, to preserve; remainder,

72 c^3. TO THE USE of my elder daughter, [*name*], and her assigns, during the term of her natural life; And after the determination of that estate by forfeiture or otherwise in the lifetime of the said [*elder daughter*], TO THE USE of [*trustees*], of &c., their executors, administrators, and assigns, during the natural life of the said [*elder daughter*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited, but, nevertheless, to permit the said [*elder daughter*], and her assigns, during her life, to receive the rents and profits of the said manors and other hereditaments for her and their proper use and benefit; And immediately after the decease of the said [*elder daughter*], TO THE USE of the first and every other son of the said [*elder daughter*], severally and successively, according to their respective seniorities, in

to sons of elder daughter successively, in tail male; remainder,

tail male; And in default of such issue, To THE USE of the first and every other son of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail general; And in default of such issue, To THE USE of the first and every other daughter of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the first and every other daughter of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail general; and in default of such issue,

to sons in tail general; remainder, to daughters in tail male; remainder, to daughters in tail general; remainder, to younger daughter of testator for life; remainder,

72 *c*[4]. To THE USE of my younger daughter, [*name*], and her assigns, for and during the term of her natural life; And after the determination of that estate, by forfeiture or otherwise, in the lifetime of the said [*younger daughter*], To THE USE of the said [*trustees*], their executors, administrators, and assigns, during the natural life of the said [*younger daughter*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited; but, nevertheless, to permit the said [*younger daughter*], and her assigns, during her life, to receive the rents and profits of the said manors and other hereditaments for her and their proper use and benefit; And immediately after the decease of the said [*younger daughter*], To THE USE of the first and every other son of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the first and every other son of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail general; And in default of such issue, To THE USE of the first and every other daughter of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the first and every other daughter of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail general; And in default of such issue, To THE USE of my own right heirs for ever.

to trustees, to preserve; remainder, to sons of younger daughter in tail male; remainder, to her sons in tail general; remainder, to her daughters in tail male; remainder, to her daughters in tail general;

72 *c*[5]. AND as to the term of —— years hereinbefore limited to the said [*trustees of term*], their executors, administrators, and assigns, I declare that the same term is so limited to them, UPON TRUST, that they the said [*trustees of term*], or the survivor of them, or the executors or administrators of

—trusts of the term of —— years to raise money to pay debts and legacies;

such survivor, or other the trustees or trustee for the time being of the said term of —— years, will and shall, as soon as conveniently may be after my decease, by demising, assigning, mortgaging (*a*), selling, or otherwise disposing of the said manors and other hereditaments comprised in the said term of —— years, or any of them, or any part thereof, for the whole or any part of the same term, or by, with, and out of the rents and profits of the said manors and other hereditaments, or any of them, or by bringing actions against the tenants or occupiers of the same hereditaments, or any of them, for the rents then in arrear, or by more than one or by all of the aforesaid ways and means, or by any other reasonable ways or means, levy and raise any sum or sums of money which they the said [*trustees of term*], or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee aforesaid, shall, in their or his discretion, think fit or expedient to levy and raise for the payment of my debts, legacies, and funeral and testamentary expenses; and will and shall pay and apply the monies to be levied and raised by the ways and means aforesaid, or any of them, in or towards the payment or satisfaction and discharge of my said debts, legacies, and funeral and testamentary expenses;

—purchasers not to be liable to see to the application of purchase-money, or to inquire into the necessity of any sale;

72 c^6. And I hereby declare, that it shall be lawful for the said [*trustees of term*], or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee aforesaid, to sign and give a receipt or receipts in writing for the sum or sums of money so to be raised by them or him as aforesaid, and that the person or persons paying or advancing the same respectively, and taking such receipt or receipts, shall not be answerable or accountable for the loss, misapplication, or non-application, or be in anywise bound or concerned to see to the application thereof, or to inquire whether my personal estate, or any part thereof, hath been previously applied, or to ascertain that the money proposed to be levied and raised is actually wanted for the purposes

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(*a*) [Here the amount to be raised being assumed to be small in comparison with the value of the estates, a term only is given to the trustees; and they are not authorised to give a power of sale to any mortgagee, such a power being unusual in a mortgage for a term. (See forms of a power to make a mortgage of the fee simple with power of sale (70 *e*), (70 *f*)).]

aforesaid, the same being absolutely left to the discretion of my said trustees or trustee for the time being, and no other person or persons is or are to be concerned or implicated therein.

72 *c*[7]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that although I have hereby given my said trustees or trustee a discretionary power to resort to my said real estates for raising money for payment of my said debts, legacies, and funeral and testamentary expenses, before my said personal estate shall have been applied or exhausted in or towards the payment thereof, yet such power is vested in them and him merely in order to facilitate the raising of money for the purposes aforesaid, and to prevent the difficulties and delay which might otherwise occur; and it is my intention, that my personal estate shall be considered as the primary and the said term of —— years the secondary fund for the payment of my debts, legacies, and funeral and testamentary expenses; and, therefore, that if my said real estate be first resorted to, my personal estate shall, so far as the same will extend, make good the money to be raised out of my said real estate, and for that purpose, as the case may require, either be applied in exoneration of the said real estates, or be laid out in the purchase of lands to be settled to the uses hereinbefore limited by me of and concerning the hereditaments hereinbefore by me devised.

—personal estate to remain the primary fund for payment of debts and legacies;

72 *c*[8]. [PROVIDED ALWAYS, AND I DECLARE, that from and immediately after the trusts hereinbefore declared of and concerning the said term of —— years shall in all respects be fully performed and satisfied, or shall become unnecessary or incapable of taking effect, and the said [*trustees of term*], their executors, administrators, and assigns, and other the trustees or trustee aforesaid, shall be fully reimbursed and satisfied all costs, charges, and expenses, if any, to be occasioned by or relating to the trusts hereby reposed in them as aforesaid (and which they and he are hereby authorised and empowered to levy and raise by all or any of the ways and means aforesaid, and to retain accordingly), the same term shall, as to all the said manors and other hereditaments comprised therein, or as to such of the same manors and other hereditaments as shall not have been sold or mortgaged for the purposes aforesaid (as the case may be), absolutely cease and determine; and as to such of the same premises as shall have been mortgaged for

—proviso as to cesser of the term;

the purposes aforesaid shall, subject to such mortgage or mortgages, wait upon and attend the freehold and inheritance of the hereditaments so mortgaged (*a*).]

to testator's younger daughter for life; remainder,

72 *c* [9]. (*Devise of estates in Lincolnshire, as in* (72 *c* [1])), To THE USE of the said [*younger daughter*], and her assigns, for and during the term of her natural life; And after the determination of that estate by forfeiture or otherwise in the lifetime of the said [*younger daughter*], To THE USE of the said [*trustees*], their executors, administrators, and assigns, during the natural life of the said [*younger daughter*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited; but, nevertheless, to permit the said [*younger daughter*], and her assigns, during her natural life, to receive the rents and profits of the same manors and other hereditaments for her and their proper use and benefit; And immediately after the decease of the said [*younger daughter*], To THE USE of the first and every other son of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the first and every other son of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail general; And in default of such issue, To THE USE of the first and every daughter of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the first and every other daughter of the said [*younger daughter*], severally and successively, according to their respective seniorities, in tail general; And in default of such issue,—

to trustees, to preserve;

to sons of younger daughter in tail male; remainder,

to her sons in tail general; remainder,

to her daughters in tail male; remainder,

to her daughters in tail general; remainder,

to testator's elder daughter for life; remainder,

72 *c* [10]. To THE USE of the said [*elder daughter*], and her assigns, for and during the term of her natural life; And after the determination of that estate by forfeiture or otherwise in the lifetime of the said [*elder daughter*], To THE USE of the said [*trustees*], their executors, administrators, and assigns, during the natural life of the said [*elder daughter*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited; but, nevertheless, to per-

to trustees, to preserve,

(*a*) [This proviso is now superfluous. But such a proviso should not be omitted in a limitation by appointment of a term for securing a jointure or portions, if the powers under which it is limited expressly require the insertion of it.]

mit the said [*elder daughter*], and her assigns, during her life, to receive the rents and profits of the same manors and other hereditaments for her and their proper use and benefit; And immediately after the decease of the said [*elder daughter*], To THE USE of the first and every other son of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the first and every other son of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail general; And in default of such issue, To THE USE of the first and every other daughter of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the first and every other daughter of the said [*elder daughter*], severally and successively, according to their respective seniorities, in tail general; And in default of such issue,—

to her sons in tail male; remainder,

to her sons in tail general; remainder,

to her daughters in tail male; remainder,

to her daughters in tail general; remainder,

72 *c* [11]. To THE USE of my niece, [*name*], and her assigns, during the term of her natural life; And after the determination of that estate, by forfeiture or otherwise, in the lifetime of the said [*niece*], To THE USE of the said [*trustees*], their executors, administrators, and assigns, during the natural life of the said [*niece*], UPON TRUST, by the usual ways and means, to preserve the contingent remainders hereinafter limited; but, nevertheless, to permit the said [*niece*], and her assigns, during her natural life, to receive the rents and profits of the same manors and other hereditaments for her and their proper use and benefit; And immediately after the decease of the said [*niece*], To THE USE of the first and every other son of the said [*niece*], severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the first and every other son of the said [*niece*], severally and successively, according to their respective seniorities, in tail general; And in default of such issue, To THE USE of the first and every other daughter of the said [*niece*], severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the first and every other daughter of the said [*niece*], severally and successively, according to their respective seniorities, in tail general; And in default of such issue, To THE USE of my own right heirs for ever.

to testator's niece for life; remainder,

to trustees, to preserve; remainder,

to her sons in tail male; remainder,

to her sons in tail general; remainder,

to her daughters in tail male; remainder,

to her daughters in tail general; remainder,

to testator's own right heirs;

72 *c* [12]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for each and every or any of my said daugh-

—power to daughters and niece to appoint

rent-charges to husbands for life;

ters and niece respectively, previously to and in contemplation of marriage or after marriage, whether actually entitled in possession under the limitations hereinbefore contained or not, (but subject and without prejudice to the estates and limitations (if any) prior to the estate for life of the person exercising this present power), by any deed or deeds, writing or writings, with or without power of revocation, to be attested by one witness or more, or by her last will and testament, or any testamentary writing, to limit and appoint, to or in favour of any husband who shall happen to survive her, one or more annual sum or sums of money, not exceeding in the whole the sum of £——, to be yearly issuing and payable out of the manors and hereditaments devised and appointed to such daughter or niece of mine respectively for life as aforesaid, for and during the life of such husband, and to be paid in such manner as my said daughter or niece respectively shall direct; And for the purpose of securing the annual sum or sums so to be appointed as aforesaid, to limit and appoint to such surviving husband the usual powers and remedies for enforcing the payment thereof respectively, by distress and entry upon and perception of the rents and profits of the hereditaments to be charged with the said annual sum or sums; And also to limit and appoint the hereditaments so to be charged as aforesaid to any person or persons whomsoever, for any term or terms of years, for securing such rent-charge or rent-charges as aforesaid, [so that the same term or terms of years be made to determine on the death of the husband for the benefit of whom the same shall be created, and the payment of the arrears of his rent-charge or rent-charges, and the expenses incurred by the non-payment thereof respectively (*a*).]

—clause limiting the aggregate amount of rent-charges affecting the lands at one time;

72 *c* [13]. PROVIDED, NEVERTHELESS, AND I HEREBY DECLARE, that the hereditaments respectively hereinbefore devised and appointed shall not, nor shall any part thereof, by virtue of the power lastly hereinbefore contained, be at any one time subject or liable to the payment of any annual sum or sums exceeding in the whole the sum of £——; And if by means thereof the same shall or would, in case this present proviso were not inserted, be charged with a greater annual sum in

(*a*) [It would be better to omit this condition. (See note (*a*), ante, p. 850.)]

the whole than £——, the payment of the annual sum occasioning such excess, or such part thereof as occasions the same, shall, during the time of such excess, be suspended.

72 *c* [14]. PROVIDED ALWAYS, that if any person to whom an estate tail is hereinbefore devised or appointed should be born in my lifetime [or in due time after my decease (*a*)], then, and in every such case, I HEREBY REVOKE the devise and appointment respectively hereby made to such person, and in lieu thereof I GIVE, DEVISE, AND APPOINT the hereditaments comprised in the devise and appointment respectively so revoked, To THE USE of the person so hereby made tenant in tail for and during the term of his or her natural life; And from and after the determination of that estate, by forfeiture or otherwise, in his or her lifetime, To THE USE of the said [*trustees*], their executors, administrators, and assigns, for and during the natural life of the person so as aforesaid made tenant for life, UPON TRUST, by the usual ways and means, to preserve the contingent remainders, and to permit and suffer such tenant for life to receive the rents and profits of the said hereditaments for his or her proper use and benefit; And immediately after the decease of such tenant for life, To THE USE of the first and every other son of such tenant for life, severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of the same first and every other son, severally and successively, according to their respective seniorities, in tail general; And in default of such issue, To THE USE of the first and every other daughter of the last-mentioned tenant for life, severally and successively, according to their respective seniorities, in tail male; And in default of such issue, To THE USE of his or her first and every other daughter, severally and successively, according to their respective seniorities, in tail general. AND I DIRECT AND DECLARE, that any and every such tenant for life, if a female, shall have the same or the like power of limiting and appointing one or more yearly rent-charge or rent-charges unto or in favour of any husband surviving her, and with such remedies and means (including the creation of a term or terms of years) for the recovery

—clause reducing estates tail of persons born in testator's lifetime to estates for life;

—power to such person to limit rent-charges to husband or wife;

(*a*) [These words are both ambiguous and of doubtful validity. The only presumption the law can make, as to the commencement of the period of gestation, is, it is submitted, that it commenced before the death of the father.]

thereof as is and are hereinbefore reserved to my daughters and niece respectively; And I further direct and declare, that any and every such tenant for life, if a male, shall be and he is hereby empowered, either before or after marriage, and whether he shall eventually become entitled to the actual possession or not, (but without prejudice to prior estates and limitations, if any), to grant, limit, and appoint to or in favour of any wife or wives surviving him, one or more yearly rent-charge or rent-charges by way of jointure, equal in amount, and in all other respects similar to and correspondent with the rent-charge or rent-charges which my said daughters and niece respectively are authorised to grant, limit, and appoint to or in favour of any surviving husband as aforesaid, with such remedies and means, by distress and entry, and the limitation of a term or terms of years, for enforcing the payment of the same rent-charge or rent-charges, as are authorised to be created or given by the exercise of the power of appointment hereinbefore reserved to my said daughters and niece respectively in favour of any surviving husband or husbands, subject, nevertheless, in respect of all the annual charges to be created by any of the means aforesaid, to the limitation and restriction in the aggregate amount thereof hereinbefore expressed.

—direction to devisees to assume testator's name and arms;

72 *c*[15]. Provided always, and I hereby request and enjoin every person (not being a female under coverture) who for the time being shall be entitled, by virtue of the limitations hereinbefore contained, to an estate for life or an estate tail in possession, in any of the manors and other hereditaments devised or appointed by this my will, and not previously having the surname and arms hereinafter required to be used, and also the husband of any female who shall so become entitled, forthwith to apply for and obtain an act of Parliament, or her Majesty's license, authorizing him or her to use the surname of —— [*testator's surname*] (*a*), either alone or in addition to his or her own surname, (but so nevertheless that the name of —— shall be the last or principal name), and also to wear my family arms quartered with his or her own family arms, and thenceforth, from time to time, to assume, use, and wear such surname and arms accordingly;

—in case of

And in case such tenant for life or tenant in tail, or the hus-

(*a*) [As to conditions imposing the assumption of a name, see 1 Jarman on Wills, 848.]

band of such tenant for life or tenant in tail (as the case may be), should neglect or fail to comply with this request or injunction for the space of —— calendar months after he or she, or his wife (as the case may be), shall so become entitled in possession as aforesaid, or if he or she should be then under the age of twenty-one years, or otherwise personally incompetent to comply therewith, then within —— calendar months after the removal of such incompetency, and also in case any such tenant for life or tenant in tail, or her husband (as the case may be), who shall previously have the surname and arms aforesaid, or who shall have assumed the surname and arms aforesaid in compliance with this present proviso, should at any time thereafter discontinue to use the same, Then and in either of the cases aforesaid, and immediately thereupon, the estate for life or estate tail or respective estates tail of every such person, or his wife or ancestor (as the case may be), in the hereditaments hereby devised and appointed, shall absolutely cease and determine, and the remainder or remainders expectant thereon shall be accelerated; Yet so, nevertheless, that if the person who or whose husband shall be guilty of such neglect and failure as aforesaid, shall be a tenant for life under the limitations hereinbefore contained, and the remainder immediately expectant on the estate of such person respectively shall be contingent, the hereditaments in respect of which such event shall have happened shall remain and be To THE USE of the said [*trustees*], their executors, administrators, and assigns, during the life of such tenant for life, UPON TRUST to preserve such contingent remainder or remainders, and from time to time, until the vesting thereof, to permit the rents and profits thereof to be received and enjoyed by the person or persons for the time being next entitled in remainder, under or by virtue of such of the ulterior limitations affecting the said hereditaments as shall have actually become vested and taken effect. AND I HEREBY DECLARE, that, in the event of the cesser or determination of the estates or estate for life of my said daughters or niece, or either of them, [or of any other tenant or tenants for life under the limitations hereinbefore contained,] by virtue of this present proviso, by reason of the neglect or failure of her or their husband or respective husbands to comply with the request and injunction aforesaid, any appointment or appointments which such daughter or daughters or niece [or other tenant or tenants for life] respectively may have made in favour of her

neglect or failure, the estate of such person to cease;

—appointment;

[his] or their said husband or husbands [or wife or wives] respectively, by virtue of the power in that behalf hereinbefore contained, shall be absolutely null and void, anything hereinbefore contained to the contrary notwithstanding.

—proviso shifting Lincolnshire estate, in case of its becoming united with the Yorkshire estate, in a child of the younger daughter;

72 *c* [16]. PROVIDED ALSO, AND I FURTHER DECLARE, that if, by reason of the failure of issue of the said [*elder daughter*], entitled or inheritable under the limitations hereinbefore contained, any child of the said [*younger daughter*], or any issue of any such child, should, for the time being, under the limitations hereinbefore contained of the said manors and other hereditaments in the said county of York, be tenant in tail male or in tail general in possession of the same manors and other hereditaments, and should, at the same time, under the limitations hereinbefore contained of the said manors and other hereditaments in the said county of Lincoln, be tenant in tail male or in tail general in possession of the said last-mentioned manors and other hereditaments, and there should then be living any other child of the said [*younger daughter*], or any issue of any such other child, Then, and so often as the same shall happen, the estate in tail male or in tail general in possession, which the person so in possession under the limitations hereinbefore contained shall be seised of or entitled to, of or in the said manors and other hereditaments in the said county of Lincoln, and also any estate in tail general to which, under the limitations aforesaid, any such person may happen to be entitled of or in the same manors and other hereditaments in remainder immediately expectant on his or her estate in tail male in possession therein, shall cease and determine. BUT I DECLARE, that if, by virtue of this proviso, my said estates in the said county of Lincoln should have shifted from any child of the said [*younger daughter*], or any issue of any such child, and there should afterwards be a failure of issue of the other child or of all the other children (if more than one) of the said [*younger daughter*], then and in that case my said estates in the said county of Lincoln shall return, be, and remain to such child, from whom or from whose issue the same shall have so shifted, in tail male, with remainder to such child in tail general, with such remainders over as are hereinbefore limited, expressed, or contained of or concerning the same.

—clause shifting the Yorkshire estate, in the event of its

72 *c* [17]. PROVIDED ALSO, AND I FURTHER DECLARE, that if there should be a failure of issue of the said [*younger daughter*], entitled or inheritable under the limitations hereinbefore

contained, and if any child of the said [*elder daughter*], or any issue of any such child, should, for the time being, under the limitations hereinbefore contained of the said manors and other hereditaments in the said county of Lincoln, be tenant in tail male or in tail general in possession of the same manors and other hereditaments, and should at the same time, under the limitations hereinbefore contained of the said manors and other hereditaments in the said county of York, be tenant in tail male or in tail general in possession of the said last-mentioned manors and other hereditaments, and there should then be living any other child of the said [*elder daughter*], or any issue of any such other child, Then, and so often as the same shall happen, the estate in tail male or in tail general in possession, which the person so in possession under the limitations hereinbefore contained shall be seised of or entitled to, of or in the said manors and other hereditaments in the said county of York, and also any estate in tail general to which, under the limitations aforesaid, any such person may happen to be entitled, of or in the same manors and other hereditaments in remainder immediately expectant on his or her estate in tail male in possession therein, shall cease and determine. BUT I DECLARE, that if, by virtue of this proviso, my said estates in the said county of York should have shifted from any child of the said [*elder daughter*], or any issue of any such child, and there should afterwards be a failure of issue of the other child or of all the other children (if more than one) of the said [*elder daughter*], then and in that case my said estates in the said county of York shall return, be, and remain to such child from whom or from whose issue the same shall have so shifted as last aforesaid, in tail male, with remainder to such child in tail general, with such remainders over as are hereinbefore limited, expressed, or contained of or concerning the same. (*Powers to lease, to sell, exchange, enfranchise copyholds, grant licenses to demise* (73 *e*), (73 *f*), (73 *n* [1]), *&c.*, (74 *a* [1]), *&c.*; *to fell timber for repairs* (75 *b*); *maintenance, &c.*, (75 *f*)).

becoming united with the Lincolnshire estate in a child of the elder daughter;

72 *c* [18]. AND WHEREAS it is my anxious desire, that the several entails created by this my will be prevented from being barred or destroyed so long as the rules of law will permit; NOW, THEREFORE, in pursuance and by virtue of the power and authority given and conferred by the act of Parliament in that behalf made and passed, I HEREBY NOMINATE AND APPOINT my friends, [*three persons*], to be protectors of the several

—appointment of protectors of estates tail;

estates tail created by this my will during the continuance of the estate or respective estates for life for the time being prior or antecedent to such estate tail or estates tail respectively, with such discretionary powers, authorities, and privileges as the said act of Parliament hath annexed to the office of protector thereby created. [And I direct and declare, that the person or persons who would, if no protector were appointed by this my will, be the protector or protectors of the said entail or entails, shall be absolutely and wholly excluded from the protectorship, notwithstanding that by death or the happening of any other event or contingency occasioning a vacancy in the said office, the protectorship hereby constituted shall be temporally suspended (*a*).]

—power of supplying vacancies in protectorship;

Provided always, and I further declare, that in case any of them the said [*protectors*], or any protector or protectors to be appointed as hereinafter mentioned, should die or be desirous to relinquish the office of protector, then and in every such case it shall be lawful for the surviving or continuing protectors or protector for the time being, or, if there should be no surviving or continuing protector, then for the executors or administrators of the last deceased protector, or, if there should be no such person, then for the protector or protectors so relinquishing the office as aforesaid, by any deed or deeds to be duly inrolled in the High Court of Chancery, to nominate and appoint one or more person or persons, not being tenant for life in possession for the time being of the hereditaments hereinbefore devised and appointed, to be a protector or protectors in the room of the person or persons who shall so have died or have relinquished the protectorship as aforesaid, to the intent that the full number of three persons shall and may from time to time fill the said office; and the person or persons so to be nominated and appointed as aforesaid shall have and may exercise, either in conjunction with the surviving or continuing protector or protectors, or solely, as the case may be, the same discretionary powers, authorities, and privileges in all respects as he or they would have had and might have exercised, if he or they had been appointed a protector or protectors of the said estate tail or

(*a*) This clause is unnecessary, if, as seems probable, the case against which it provides falls within the last clause of the 33rd section of the stat. 3 & 4 Will. 4, c. 76, vesting the protectorship in the Court of Chancery.

respective estates tail by this my will (*a*). And it is my especial request and entreaty that the protectors for the time being will exercise the controlling power vested in them by the aforesaid act of Parliament, in declining and refusing, during the whole continuance of the protectorship hereby created, to aid any tenant in tail under this my will in acquiring the fee-simple in the hereditaments hereby limited to him or her, unless for the purpose of re-settling and assuring the said hereditaments in such manner as will tend to fix and perpetuate the same in my descendants.

—injunction to protectors to preserve entails;

72 *c* [19]. And I give and bequeath all the plate, pictures, engravings, drawings, sculptures, china, glass, books, linen, and other household goods and furniture whatsoever, being at the time of my decease in any house or houses then occupied by

—bequest of household furniture as heirlooms;

(*a*) In framing the appointment of protectors and the power of supplying vacancies, the following points are to be remembered :—

Points to be attended to in framing appointment of and power of nominating protector.

1st. That the protectors appointed by the testator must not exceed three in number, must be in esse at his death, and not *aliens*.

2nd. That the power of new appointment authorised by the act only extends to vacancies occurring by death or relinquishment. Other occasions of vacancy are provided against by the Legislature itself.

3rd. That if the owner of the prior estate for life or estate determinable with life is made one of the protectors, he should be prohibited from acting as protector in case of the office becoming, by the death or retirement of his coadjutors, vested solely in him, as otherwise it should seem he might do. The effect of such a declaration is, to constitute the Court of Chancery protector until the vacancy in the protectorship is supplied under the power.

With respect to the injunction which the testator in the precedent in the text has thought proper to lay upon his protectors, it should be remarked that it creates no *legal* obligation ; the act having anxiously and explicitly declared the protector's discretion to be absolute and uncontrollable. It is probable, however, that the new scheme will tend to prolong the continuance of entails ; as a disinterested protector, who is specially appointed for the preservation of an entail, is far more likely to abstain from concurring in its destruction, than a tenant for life, who often derives a benefit from, and is indeed the chief mover in, the transaction. [It is to be remembered, however, that a specially appointed protector cannot be restrained from *selling* his concurrence in the destruction of the entail, however discreditable such a bargain might be. The most efficient security for the preservation of an entail is, perhaps, to be found in the Court of Chancery : *Re Blewitt*, 3 Myl. & K. 250. By appointing infants protectors, and providing for the substitution of other infants on their coming of age, the Court of Chancery may, it seems, be made in effect the protector of the settlement. (See 3 & 4 Will. 4, c. 74, ss. 32, 33).]

me or by my bailiff, servant, or other person for my use, (including any articles which shall or may have been removed therefrom for repair or other temporary purpose or which shall or may have been purchased by me, and directed to be sent to any such house or houses (*a*)), to the said [*trustees*], their executors, administrators, and assigns, Upon trust to permit the same from time to time to go and be held and enjoyed with the said house or houses respectively, so far as the rules of law and equity will admit, by the person or persons who for the time being shall be entitled to the possession of the same house or houses respectively, by virtue of this my will; yet so that the said furniture and other effects shall not vest absolutely in or become the property of the child of any person hereby made tenant for life of the said house respectively, unless such child shall attain the age of twenty-one years. But, nevertheless, such child respectively shall, during his or her minority, be entitled to the use and benefit of the said furniture and effects.

—direction to trustees to take an inventory;

And I direct, that as soon as conveniently may be after my decease, the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, shall cause schedules and inventories to be taken of the said furniture and other articles, and two copies to be made thereof, and shall sign each of the said copies and keep one of them, and leave the other at the house to which the said furniture and effects shall belong; and shall from time to time cause the same copies to be signed by the person for the time being entitled in possession to the said house or houses respectively under this my will.

—and from time to time examine the effects.

And I direct, that the said [*trustees*], and the survivor of them, and the executors and administrators of such survivor, may and shall from time to time inspect and examine into the state of the said furniture and other effects, and cause such reparations and restorations and replacings to be made thereof from time to time as they or he shall think proper; such reparations and restorations and replacings to be made at the expense of the person or persons for the time being entitled to hold, use, and enjoy the furniture and other articles under the trusts of this my will. (*Add Appointment of executors; Disposition of residuary personal estate; Devise of trust and mortgage estates; Trustees' receipt clause, and Power to appoint new trustees, and Trustees' indemnity clauses*).

(*a*) [Vide ante, p. 403.]

72 *d*[1]. And I give, devise, and appoint all other my real estates, wherever situate, and also all the real estates over which I have any power, To the use of my eldest son, [*name*], and his assigns, during the term of his natural life, without impeachment of or for any manner of waste; And from and after the determination of that estate, then To the use of the said [*trustees*], their executors, administrators, and assigns, during the natural life of the said [*eldest son*], Upon trust, by the usual means, to preserve the contingent uses and estates hereinafter limited from being defeated or destroyed; but, nevertheless, to permit my said eldest son, [*name*], and his assigns, during his life, to receive the rents and profits thereof for his and their own use and benefit; And from and after the decease of the said [*eldest son*], To the use of the first, second, and all and every son and sons of my said son [*eldest son*], severally, successively, and in remainder, one after another, as they shall respectively be in priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons, the elder of such sons and the heirs male of his body being always to be preferred to the younger of such sons and the heirs male of his and their body and respective bodies; And for default of such issue, (*Here insert limitations to the testator's second son, and his first and other sons in tail male in like manner, with remainder to the testator's third son for life, and to his first and other sons in like manner*).

Devise and appointment of real estates;

—to the use of eldest son and his assigns, for life;

remainder,

to trustees during life of son, to preserve;

remainder,

to the first and other sons of eldest son successively in tail male;

remainder,

—to second and third sons, and their issue, in like manner;

remainder,

72 *d*[2]. And, for default of such issue, To the use of the said [*trustees exclusively of eldest son*], their heirs and assigns, for ever, Upon trust, that the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, will and shall, as soon as conveniently may be after the decease and failure of issue male of my said several sons as aforesaid, sell and dispose of the said real estates hereinbefore devised and appointed, either together or in parcels, by private contract or public sale, with such accompanying powers in relation to such sale or sales as are hereinbefore expressed and given concerning my leasehold messuage in —— aforesaid; And as to the money arising from the sale of the said real estates, I direct that my trustees or trustee for the time being of the estates lastly hereby devised shall and do stand possessed thereof—

to trustees, in trust to sell,

and divide proceeds among testator's daughters living at his death, and failure of issue of his sons, with substitution of children of deceased daughters;

72 *d*[3]. UPON TRUST to pay and divide the same unto, between, or among such of my daughters as shall be living at the time of my decease and at the decease of the survivor of my said sons, and such failure of issue male of their respective bodies as aforesaid, share and share alike, if more than one, and if but one, then to such one daughter only; And in case any of my said daughters should die previously to the decease of my said sons, and such failure of issue male of their respective bodies as aforesaid, (whether in my lifetime or after my decease), leaving one or more child or children living at the time of her decease, and who shall be living at the time of the decease of the survivor of my said sons and such failure of issue male as aforesaid (*a*), and shall attain the age or respective ages of twenty-one years, then I DIRECT that such child or children of every such daughter so dying, of and in the said trust-monies, shall be entitled to the share which his, her, or their deceased parent would have been entitled to, if living at the death of the survivor of my said sons, and such failure of issue male as aforesaid; and that such share shall be equally divided between or among such children, if more than one, share and share alike. AND I DIRECT AND DECLARE, that, in case at the time of the decease of the survivor of my said sons and such failure of issue male as aforesaid, any of the children of any deceased daughter of mine should be under the age of twenty-one years, the annual income arising from the expectant or apparent share of each such minor shall be applied for his or her maintenance and education until such share shall become vested, or he or she shall previously die. *Power to sons to lease* (73 *c*); *Trustee clauses* (80 *a*[1]), *&c.*)

—income to be applied for maintenance during minority.

To testator's only son for life; remainder,

72 *e*[1]. TO THE USE (*b*) of my son, [*name*], and his assigns, for and during his natural life, without impeachment of waste,

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(*a*) This bequest, although not to take effect until after an indefinite failure of issue, is valid; the persons, the failure of whose issue is to entitle the legatees, being devisees in tail. The gift, therefore, notwithstanding its remoteness, does not involve the danger of a perpetuity. (Vide ante, p. 157).

Suggestion as to the mode of devising to uses.

(*b*) Where lands are intended to be limited by will to uses in strict settlement or any other series of uses, it is better to devise them directly to the intended cestuis que use than through the medium of a devisee to uses, in order to prevent the devise from being affected (if it

(except voluntary waste in pulling down houses or other buildings and not rebuilding the same); And from and after the determination of that estate by forfeiture or otherwise in his lifetime, To THE USE of [*trustees*], their executors, administrators, and assigns, for and during the natural life of my said son, UPON TRUST to preserve the contingent remainders hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions and do such other acts as occasion may require; but, nevertheless, to permit and suffer my said son and his assigns to receive and take the rents and profits of all the said hereditaments, [and to present to the said church of —— during his natural life;] And from and after the decease of my said son, To THE USE of the first son of the body of him my said son, [*name*], and the heirs of the body of such first son; And in default or on failure of such issue, To THE USE of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said [*son*], and the heirs of the body and bodies of every such son severally and successively, as they respectively shall be in seniority of age, the elder of such sons and the heirs of his body being always preferred to the younger of such sons and the heirs of his or their body or bodies; And in default or on failure of such issue of my said son—

to trustees to preserve; remainder,

to first and other sons of testator's son successively in tail general; remainder,

72 e^2. To THE USE of all and every the daughter and daughters of the body of him my said son, [*name*], and the heirs of the body and respective bodies of such daughter and daughters, equally to be divided between or among such daughters if more than one, share and share alike, as tenants in common and not as joint tenants (*a*); and if there should

to son's daughters in tail general, as tenants in common;

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would be affected) by the decease of such devisee in the testator's lifetime, according to the doctrine suggested by Sir E. Sugden in his Treatise on Powers, 5th ed., p. 138. Another objection to such mode of framing the devise is, that if the testator has a power of appointment, and the devise happens to operate as an execution of such power, the effect is to transfer the use to the first nominee of the testator; in other words, to vest the legal estate in the devisee to uses, (who is really intended to take nothing), and confer on the intended cestuis que use equitable interests only.

(*a*) The limitations in this form, in giving estates tail general to the sons of the testator's son successively, with remainder to the son's daughters in tail general concurrently, differ from those in any preceding form. Such limitations are very common in marriage settlements.

be but one such daughter, then To THE USE of such only daughter and the heirs of her body. And in case there should be more than one such daughter, and there should be a failure of issue of the body or bodies of any one or more of such daughters, then as to both the original part and share or parts and shares of such daughter or daughters respectively whose issue shall so fail, and also such other part and share or parts and shares in the said hereditaments as by virtue of this present clause shall have become vested in or have accrued unto such daughter or daughters respectively or her or their issue upon the failure of issue of any other or others of the same daughters, To THE USE of the remaining and other and others of the same daughters, and the heirs of the body and respective bodies of such remaining and other daughters, equally between or among them (if more than one), share and share alike, as tenants in common and not as joint tenants; and if there should be but one such remaining or other daughter, then To THE USE of such only daughter and the heirs of her body; And in default or on failure of such issue, To THE USE [*other limitations*].

—cross remainders in tail among the daughters;

72 e^3. PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for my said son, by any deed or deeds under his hand and seal, attested by one or more witness or witnesses, or by his last will and testament in writing, or any testamentary writing, to grant, limit, settle, or appoint to or for the use of any and every woman whom he shall happen to marry (and that either before or after such marriage), for and during the term of the natural life of such woman, for or in the name or names of her jointure or part of her jointure, any annual sum or yearly rent-charge, not exceeding £—— by the year, free from and without any deductions for taxes or otherwise, to be issuing and payable out of and to be charged and chargeable upon all or any part or parts of the said hereditaments hereby devised in settlement, with usual powers of distress and entry upon and perception of the rents and profits of the hereditaments so to be charged therewith, for receiving and recovering the same annuity or yearly rent-charge when in arrear, And to raise, create, and demise such term or terms of years of or in the same hereditaments, and to declare such trusts, powers, and provisoes for the better securing, raising, and paying of the same rent-charge, from and immediately after the decease of my said son, as are

—power to testator's son to jointure any wife;

usually contained in grants of the like jointures or rent-charges.

72 e^4. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said son, by the same or any other deed or deeds, to be attested as aforesaid, or by his last will and testament in writing, or any testamentary writing, to charge all and every or any of the said hereditaments hereby devised in settlement with the payment of such sum or sums of money as he shall think fit, not exceeding in the whole the sum of £—— of lawful British money, for or towards the portion or portions of all and every or any of the daughter or daughters and younger son or younger sons of my said son who shall attain the age of twenty-one years or marry (*a*), and who shall not be entitled or presumptively entitled to the said hereditaments in remainder immediately expectant on the decease of the said [*son*], And also with the payment of such yearly sum or sums of money as he shall think fit, for or towards the maintenance and education of the daughter or daughters and younger son or younger sons for the time being of my said son until her or their portion or respective portions shall become vested and payable, so as the same do not exceed the interest of such his, her, or their portion or respective portions or presumptive or expectant portion or respective portions after the rate of £4 per centum per annum, And to raise, create, and demise such term or terms of years of or in the said manor and hereditaments so to be charged therewith, for securing, levying, raising, and paying such portion or respective portions and maintenance as is or are usually limited or created for the like purposes.

—power to testator's son to charge estates with portions for younger children;

72 e^5. PROVIDED ALSO, AND I FURTHER DECLARE, that in case my said son should die without leaving lawful issue who shall be living at his decease, it shall be lawful for him, by his last will and testament in writing, or any testamentary writing, to subject and charge all or any of the aforesaid hereditaments hereby devised in settlement, or any part or

—power to son, in case of his dying without leaving issue, to charge estates with a sum of money by will.

(*a*) Observe that the power of charging portions differs from the forms of the like power, (72 a^5), (72 b^{14}), in being made exercisable in favour of children who attain majority or marry only (as to which, vide ante, p. 536, n.) Another diversity is, that the power is reserved to a single tenant for life, which renders unnecessary some clauses and topics of consideration which are applicable where such a power is reserved to a series of successive tenants for life. Vide ante, p. 841.

parcel thereof, to and with the payment of any sum or sums of money not exceeding in the whole the principal sum of £—— of lawful British money, unto any person or persons whomsoever, and for such uses, intents, and purposes as he shall think proper; And, for securing the payment of such sum or sums so to be charged, with interest, by such will or testamentary writing, to limit or create any term or terms of years whatsoever of or in the estate and premises so to be charged, or any part or parcel thereof, as is or are usually limited or created for the like purposes. (*Add powers of leasing* (73 n^1), (73 n^2), (73 n^3); *of sale, exchange, and enfranchisement* (74 a^1), *&c.; and power to receive and apply rents during the minority of any tenant or tenants in tail,* (72 a^3) *and* (72 a^4), *or* (72 b^8), *or* (75 f^1)).

Devise of freehold messuage to testator's son for life; remainder,

72 f^1. I GIVE AND DEVISE all that my freehold messuage or tenement situate at ——, now in my occupation, with the appurtenances thereto belonging, to the uses following, (that is to say), To THE USE of my son, [*name*], and his assigns, during his life; And after the determination of that estate by any means in his lifetime, To THE USE of the said [*trustees*], and their heirs, during the life of the said [*son*], UPON TRUST, by the usual means, to preserve the contingent remainders hereinafter limited; nevertheless, to permit the said [*son*], and his assigns, to receive the rents and profits thereof; And

to son's children and issue, as he shall appoint;

after the decease of my said son, To THE USE of such one or more of the children or more remote issue of the said [*son*], for such estate or estates, in such shares (if an appointment should be made in favour of more than one), and subject to such provisions for maintenance during minority, and other powers, provisoes, limitations, and restrictions in favour of any one or more of such children or more remote issue, as the said [*son*], by any deed or deeds, revocable or irrevocable, to be by him duly executed, or by his last will and testament in writing, or any testamentary writing, shall at any time or times, or from time to time, direct or appoint.

72 f^2. AND I DECLARE, that it shall be lawful for my said son, if he should deem it expedient so to do, in the exercise of the aforesaid power, to limit and appoint the said hereditaments to any person or persons, UPON TRUST to sell the same, and to pay and apply the monies arising therefrom unto or for the benefit of any object or objects of the said power, and

to authorise such trustee or trustees to sell, subject to any special conditions, and to discharge the purchaser or purchasers from liability to see to the application thereof (*a*).

72*f*[3]. But I expressly declare, that no child or other issue of my said son shall take or acquire any descendible or transmissible estate or interest under or by virtue of any such appointment as aforesaid, until such appointee or appointees respectively shall have attained the age or respective ages of twenty-one years or shall marry (*b*).

—appointees not to take transmissible interests before majority or marriage.

(*a*) A power to appoint to a certain class of objects has been held to be well executed in equity by an appointment to trustees for sale, with a direction to apply the produce for the benefit of the objects of the power: *Kenworthy* v. *Bate*, 6 Ves. 793; *Bullock* v. *Fladgate*, 1 Ves. & Bea. 478. But a doubt is entertained by some practitioners whether, in such case, the donee is enabled to clothe the trustees with the power of giving discharges for the purchase-money.

Whether power of selection authorises an appointment to trustees for sale.

(*b*) Under the old law of inheritance it was not necessary to guard a father's power of selection over freehold estates in favour of his issue against that species of abuse in its exercise, noticed by Lord Eldon to have been practised in *Lord Sandwich's case*, cit. 11 Ves. 479 (where the donee of such a power exercised it in favour of a child supposed to be in a consumption), because a freehold estate so appointed could not, in the event of the subsequent death of the appointee, descend from him [directly] to the donee; so that the latter could not [except under extraordinary circumstances] derive any personal advantage from such a fraud. Now, however, that the father is placed within the line of inheritors (his position in that line being immediately after lineal descendants, vide stat. 3 & 4 Will. 4, c. 106), powers of selection over realty are susceptible of the same abuse, and therefore require the same preventive expedient as similar powers over personal estate. For instance, suppose that the donee, under the power in the text, should, immediately on the birth of a child, appoint the remainder in fee to such child, (but as to such an appointment, see *Lord Hinchinbroke* v. *Seymour*, 1 B. C. C. 394), and the appointee should happen to die without issue and intestate, (and intestate he necessarily would be if he died during minority), the remainder would descend to the father, who, it is observable, might, by reserving to himself a power of revoking the appointment, retain in his own hands the means of recalling his donative act, if, contrary to expectation, the appointee should outlive childhood. Where the parent to whom the power is reserved is the *mother*, the reason for the precaution in question loses part, but only a part, of its force, as the donee would be entitled (supposing the subject of the power to be personalty) to participate with the brothers or sisters, or nephews or nieces, if any, of the appointee, in the distribution of his or her personal estate, and not, like the father, to take the whole in preference to all collateral relatives whatever: (vide ante, p. 408). Still, however, the incentive is sufficient to warrant and call for the adoption of the restriction in

Expediency of restraining a parent from appointing to minor and unmarried children.

—and in default of appointment, to the use of children equally;

—clause of accruer;

72*f*[4]. And in default of such direction or appointment, and subject thereto, To the use of all and every the child and children of my said son, [*name*], begotten and to be begotten, his, her, and their heirs and assigns for ever, if more than one, as tenants in common. And if any of such children should die under the age of twenty-one years, and without having been married, then, as to the share or respective shares, as well original as accrued, of such child or children respectively in the said messuage or tenement and hereditaments, To the use of the others or other of such children, and their, his, or her heirs and assigns for ever, and if more than one as tenants in common.

—hotchpot clause;

72*f*[5]. Provided always, and I hereby declare, that no child of my said son who shall take any part or share in the said hereditaments hereinbefore devised, under or by virtue of any appointment to be made thereof as aforesaid, shall be entitled (unless such appointment shall expressly so direct) to share with the other child or children in any unappointed part, share, or interest thereof or therein, unless such child or children respectively shall bring his, her, or their appointed share or shares respectively into hotchpot or distribution with the other child or children of my said son.

—power to apply rents for maintenance during minority;

72*f*[6]. And if any child or children of my said son should, at the time of his decease, be under the age of twenty-one years and unmarried, then I empower the said [*trustees*], or the survivor of them, his executors or administrators, or other the trustees or trustee for the time being of this my will, to enter into the receipt of the rents and profits of the said hereditaments, and apply the same or so much thereof as shall arise from the share or respective shares of such minor or minors therein, under or by virtue of the limitations aforesaid, for the maintenance, education, and support of such minor or

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question: indeed, if the donee happened to have no other issue than the appointee, the interest of the mother, being the sole presumptive or expectant next of kin, would be precisely the same as that of a father. In regard to freehold estates, the mother is also, under the recent enactment, competent to inherit, and takes precedence of all persons who trace their descent through her. She, however, and all persons claiming through her, are postponed to the paternal line. The result, therefore, is, that, in regard both to real and personal estate, a power of selection in favour of issue, whether reserved to the father or mother, may be properly subjected to the qualification in question, unless, indeed, the power authorises testamentary appointments only, to which, it is obvious, the reason for any such restriction on its exercise does not apply.

minors, in such manner as the said trustees or trustee shall think proper (*a*).

72 *f*[7]. And in case my said son, [*name*], should have no child who shall survive me and who shall attain the age of twenty-one years or marry, then I give and devise the said messuage or tenement, hereditaments, and premises, to such and the like uses, for such and the like estates and interests, upon such and the like trusts, and subject to such and the like power of appointment and other provisoes and declarations in all respects, to or in trust for or for the benefit of my son, [*second son*], and his child or children or more remote issue, as are hereinbefore expressed and contained to or in trust for or for the benefit of my said son, [*eldest son*], and his child or children or more remote issue, as fully and effectually as if the same were here repeated. (*Add power to lease, and, if intended, power to sell*).

—in default of children of first son, to same uses for second son and his children and issue.

72 *g*[1] (*b*). I give, devise, and appoint, all my real estates whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy (other than the hereditaments

(*Accumulation and remote vesting*). Devise of real

(*a*) The property being of small value, no provision is made for the event of the income exceeding what is required for maintenance.

(*b*) By this form, the vesting of the equitable inheritance is postponed to the extreme verge of the limits prescribed by the rule against perpetuities, (vide ante, p. 157), except, indeed, that a term of twenty years is substituted for the term of twenty-one years, which that rule allows to be added to existing lives—a variation which has been made, not from any doubt of the testator's competence to have adopted the latter period, but for the mere sake of more obviously distinguishing the term in question from the term created for the purpose of restricting the accumulation of the income within the statutory limitation. (Vide ante, p. 195). It will be observed, that, with a view to protract the vesting as long as possible, several classes of existing lives have been selected, comprising a sufficient number of individuals to insure to the testator a moral certainty of his scheme being carried on during the full ordinary period of human life, even before the adjunctive absolute term is entered upon. Supposing any one of the numerous persons described to live for seventy years—a supposition by no means improbable when the juvenility of many of them is considered—the lives and absolute term make up an aggregate of nearly a century, during the whole of which period the vesting is necessarily suspended, on account of the uncertainty who will be the heir male or heir general of the body of the testator, or his heir general (as the case may be) at its expiration. But though the validity of such a disposition of property is unquestionable, and though it seemed proper to supply a precedent exhibiting a simple mode of accomplishing the intention, testators should not be encouraged by

Remarks upon the scheme for protracting the vesting.

estate to trustees in fee,

vested in me as mortgagee or trustee), to [*five trustees*], of &c., To HOLD the same unto and to the use of the said [*trustees*], their heirs and assigns for ever, or for the whole of my estate and interest therein, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same, (that is to say), UPON TRUST, from time to time, for and during the lives of all such of my children and more remote issue as shall be living at the time of my decease, and also of such of the children and more remote issue of my late father, [*name*], deceased, as shall be living at my decease, and also of such of the children and more remote issue of the said [*trustees*], respectively, as shall be living at my decease, and also of my said trustees themselves, and during the lives and life of the survivors and survivor of such several classes of children, issue, and trustees, and also for and during the further term or period of twenty years, to commence and be computed from the time of the decease of the survivor of the said children, issue, and trustees, to receive and take the rents and profits to arise from the said real estates hereinbefore devised: AND as to, for, and concerning the rents and profits of the said real estates for and during the term of twenty-one years, computed from the time of my decease (*a*), to stand possessed of and apply the same, when and as the said rents and profits shall from time to time be received as aforesaid, upon the trusts and for the purposes following; (that is to say),

upon trust, during numerous lives and twenty years, to receive the rents;

—during twenty-one years from testator's decease;

72 *g*[2]. UPON TRUST, in the first place, to raise and pay thereout to each of my sons who shall be living at the time of my decease the annual sum of £——, during so much of the said term of twenty-one years as such respective son shall happen to live, each such annuity to be payable quarterly, clear of legacy duty and every other deduction, with a proportional part thereof up to the period of the actual determination of the same annuity respectively, the first quarterly payment thereof to be made at the expiration of three calendar months from the day of my decease. AND I DECLARE, that the said annuities respectively shall be and constitute a per-

—to pay certain life annuities to his sons, to cease on alienation;

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their professional advisers in these elaborate contrivances to push their restrictive limitations into a remote futurity. The present scheme has this most repulsive characteristic—that it inflicts the penalty of exclusion on every individual among the testator's descendants in whose favour personal knowledge might have been supposed to have created any feeling of tenderness or regard.

(*a*) Vide stat. 39 & 40 Geo. 3, c. 98, stated ante, p. 196.

sonal and inalienable provision for my said sons respectively, and that in case the same annuities, or any part thereof respectively, should be assigned, incumbered, or in any manner anticipated by my said sons respectively, or in case such annuities, or any part thereof respectively, should, by operation of law or by any other means whatsoever, become payable to or receivable by any person or persons whomsoever other than my said sons respectively, such annuities or annuity respectively shall immediately thereupon cease and determine; and subject to the payment of the said annuities respectively, or after the determination thereof (as the case may be),

—and invest surplus of rents in purchase of real estate,

72 g^3. Upon trust, from time to time, during the said term of twenty-one years, to lay out and invest the residue or surplus or the whole of the said rents and profits (as the case may be), in the purchase of freehold or copyhold lands or other hereditaments in England or Wales, held for an estate of inheritance in fee simple, to be conveyed and assured to the use of the trustees for the time being of my will, their heirs and assigns, upon the trusts and for the intents and purposes in this my will expressed concerning the real estates hereby devised, or upon and for such of the same trusts, intents, and purposes as shall be then subsisting or capable of taking effect.

until purchase-monies be laid out in securities;

72 g^4. And I declare, that in the meantime, until the said monies shall be so laid out, the same shall be from time to time invested by the said trustees for the time being, in their own names, in the Consolidated Three Pounds per Centum Annuities, or in the Reduced Three Pounds per Centum Annuities, or in Exchequer Bills, which funds and securities may be changed and varied as often as shall be deemed expedient, and the dividends and annual produce thereof shall from time to time be applied in such and the same manner as the said rents and profits are hereinbefore directed to be applied, so as to form an accumulating fund in the nature of compound interest.

—at the expiration of twenty-one years, rents to be paid to persons who would be entitled under following limitations;

72 g^5. And as to, for, and concerning the rents and profits to arise from the said real estates hereinbefore devised, after the end or expiration of the said term of twenty-one years, Upon trust, from time to time during the lives of the said children, issue, and trustees, and the lives and life of the survivors and survivor of them, and also for and during the said term of twenty years, commencing from the decease of such survivor as aforesaid, to pay the rents and profits arising from the said real estates respectively unto, or permit the

same to be received and enjoyed by, the person or persons who would for the time being be entitled thereto, if the said real estates stood actually limited to the uses following; (that is to say),

—to the use of eldest son for life; remainder,

72 g^6. To THE USE of my eldest son, [*name*], for and during the term of his natural life; and, from and immediately after his decease, To THE USE of the first and every other son of the said [*eldest son*], lawfully begotten, successively, according to seniority, and the heirs male of the body of every such son, the elder of such sons and the heirs male of his body being always to be preferred to the younger of such sons and the heirs male of his and their body and bodies; And, for default of such issue, To THE USE of my second son, [*name*], for and during the term of his natural life; and, from and after his decease, To THE USE of the first and every other son of the said [*second son*], successively, according to seniority, and the heirs male of the body of every such son, the elder of such sons and the heirs male of his body being always to be preferred to the younger of such sons and the heirs male of his or their body or respective bodies; And, for default of such issue, To THE USE of each of my other sons lawfully begotten during the term of his natural life; And, after his decease, To THE USE of his first and every other son lawfully to be begotten, successively, according to seniority of age, in tail male, the elder of my said other sons, and his first and other sons successively in tail male, being always preferred to the younger of my said other sons, and his and their first and other sons in tail male; And, for default of such issue, (*Add limitations to the testator's daughters and their issue successively in tail male in like manner, with remainder to the first and other sons of the testator's sons successively in tail general, with remainder to his first and other daughters successively in tail general, with remainder to the testator's own right heirs*).

to his first and other sons successively in tail male; remainder,

to second son for life; remainder,

to his first and other sons in tail male; remainder,

to each of testator's other sons for life; remainder,

to their first and other sons, in like manner;

—to testator's daughters and their issue, in like manner;

—at the end of term, trustees to convey to testator's heir, lineal or collateral, in fee.

72 g^7. AND from and after the end or expiration of the said term or period of twenty years, commencing from the decease of the survivor of the several persons hereinbefore described or referred to as aforesaid, then I EMPOWER AND DIRECT the trustees for the time being of my will forthwith to convey and assure all and singular the real estates hereinbefore devised, and also such real estates as shall have been purchased and acquired by the said trustees or trustee under or by virtue of the trusts and directions hereinbefore or hereinafter contained, To THE USE of the person who shall then answer to the description of heir male of my body, his heirs

and assigns for ever; and if there should be no person answering to such description, then To THE USE of the person or persons who shall, at the end or expiration of the said term of twenty years, answer to the description of heir general of my body, his, her, or their heirs and assigns for ever, if more than one, as tenants in common; and if there should be no person answering to the last-mentioned description, then To THE USE of the person or persons who shall then answer to the description of my heir general, his, her, or their heirs and assigns for ever, if more than one, as tenants in common; and upon, to, or for no other trust, intent, or purpose whatsoever. (*Add full powers to (trustees only) to lease* (73 n^1), *&c.*, (73 *f*); *to sell and exchange; to concur in partition; to enfranchise copyholds* (*a*) (74 a^1), *&c. Bequest of personalty to be invested in the purchase of lands to be settled to the uses of the will* (48 c^1) *to* (48 c^7), (48 e^1), (48 e^2). *Authority to complete alterations in mansion-house, to repair, and to permit son to reside in mansion-house, and to appoint bailiffs thereof* (75 *c*), (75 *d*), (75 *g*). *Devise of trust-estates* (68 *c*). *Direction to keep up number of trustees* (80 *i*). *Power to the majority to act, indemnities, &c.*, (80 *g*), (80 k^1), (80 l^1), (80 l^2)).

73 *a*. PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for my said trustees or trustee for the time being, [with such consent or] in such discretion as aforesaid, to grant leases of any messuages, lands, tenements, or hereditaments, to be so purchased as aforesaid, for any term not exceeding twenty-one years in possession, at rack-rent, without taking any fine, premium, or foregift, [or for any term not exceeding ninety years, for mining, building, repairing, or improving purposes, without taking any fine, premium, or foregift]. AND I DECLARE, that my said trustees or trustee for the time being shall have a like power of granting leases of any other of my messuages, lands, or hereditaments, which for the time being shall form part of my trust-estate. Power to lease purchased lands.

73 *b*. PROVIDED ALWAYS, AND I HEREBY DECLARE, that it shall be lawful for my sons and daughters severally, as and Power of leasing reserved to tenants for life and trustees;

(*a*) These powers are proper to be inserted, without inquiry as to the particulars of the testator's property at the date of the will, wherever the limitations include a general residue, or contain a power to purchase other lands.

when, by virtue of the limitations hereinbefore contained, they shall successively and respectively be in the actual possession of or beneficially entitled to the receipt of the rents and profits of the said hereditaments hereinbefore devised, and also for the trustees and trustee for the time being of my will, from time to time, and at all times during the minority of any son or daughter of mine for the time being entitled in possession as aforesaid, or of the issue of any such sons or daughters respectively, who, by virtue of any of the limitations aforesaid, shall be entitled to any estate in tail male or in tail general in possession of and in the said hereditaments, or any part or share thereof, by any deed or deeds, to demise or lease all or any part or parts of the said hereditaments hereinbefore devised, to any person or persons for any term or number of years absolute, not exceeding twenty-one years, to take effect in possession and not in reversion or by way of future interest; so that there be reserved on every such lease the most improved yearly rent or rents to be incident to the immediate reversion of the said hereditaments, and no fine, premium, or foregift be taken for the making thereof, and so that there be contained in every such lease a condition of reentry for nonpayment of rent, and so that the respective lessees be not made dispunishable for waste or exempted from punishment for committing waste.

Power for sons when in possession to lease.

73 *c.* And I hereby declare and direct, that it shall be lawful for my said sons respectively, when and as they shall come into possession of my messuages, lands, and hereditaments limited to them for life respectively as aforesaid, to lease or demise the same, or any of them, or any part or parts thereof, to any person or persons for any term or number of years, not exceeding twenty-one years in possession; so that in every such lease there be reserved, payable during the continuance thereof, the most improved yearly rent that can be reasonably had or obtained for the same, without taking any fine or premium.

Leasing power to trustees of lands devised in trust.

73 *d.* I also empower my trustees for the time being, with the consent in writing of the persons for the time being entitled to the rents and profits of the hereditaments hereinbefore devised and bequeathed in trust as aforesaid, or such of the persons so entitled as shall be of the age of twenty-one years, and if there should be no such person, then of the proper au-

thority of the said trustees, to demise the said hereditaments hereinbefore devised and bequeathed in trust as aforesaid, or any part thereof respectively, from year to year, or for any term not exceeding twenty-one years in possession, at rack-rent.

Ordinary power of leasing for twenty-one years.

73 *e.* PROVIDED ALSO, AND I FURTHER DECLARE, that it shall be lawful for every person who by virtue of this my will shall be tenant for life in possession, or tenant in tail [male] in possession, of any of the hereditaments hereby devised and appointed respectively, and who shall have attained his or her age of twenty-one years, and for the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor during the minority of any such tenant for life or in tail [male], by any deed or deeds attested by one or more witness or witnesses, to appoint the said estates respectively to any person by way of lease, for any term of years not exceeding twenty-one years, to be computed from the making thereof, at the best yearly rent that can be reasonably gotten for the same, without taking any fine or foregift for the making thereof, but so that there be contained therein a condition of re-entry for nonpayment of the rent thereby to be reserved, and so that the lessee execute and deliver a counterpart thereof, and thereby covenant for the payment of the rent.

Power to grant building leases for ninety-nine years.

73 *f.* PROVIDED ALSO, [that it shall be lawful for my said trustees [or trustee] for the time being, *or*,] that it shall be lawful for every person who by virtue of this my will shall be tenant for life in possession, or tenant in tail [male] in possession, of the hereditaments respectively hereby devised and appointed, and who shall have attained his or her age of twenty-one years, and for the said [*trustees*], and the survivor of them, and the executors or administrators of such survivor during the minority of any such tenant for life or in tail [male], by any deed or deeds attested by one or more witness or witnesses, to appoint by way of lease any part of the said estates to any person who shall improve or covenant or agree to improve the same by erecting or building thereupon any new house or new erection, or to rebuild or repair any of the messuages, erections, and buildings whatsoever, which now are or which hereafter shall be upon the said hereditaments or any part thereof, or who shall expend or covenant to expend any sum of money in the improvement or amelioration thereof respectively, which the person or persons making

such appointment by way of lease shall think adequate to the interest to be departed with, for any term of years not exceeding ninety-nine years, at such rent or upon such terms and conditions as shall be thought reasonable, and without taking any fine or foregift for the making thereof beyond such covenants or agreements as aforesaid, but so that the lessee execute and deliver a counterpart of the appointment so to be made to him by way of lease as aforesaid, and be not thereby exempted from punishment for committing waste farther than shall be necessary for making or effecting the buildings or improvements thereby covenanted and agreed to be made.

Short power to lease lands subject to a power of sale.

73 *g*. And I hereby empower my trustees or trustee for the time being to demise at rack-rent, for any term not exceeding twenty-one years in possession, any part of my freehold, copyhold, or leasehold hereditaments which for the time being shall remain unsold under the trust aforesaid.

Power to lease with consent.

73 *h*. I empower my trustees or trustee, but with the consent of my wife if she be living, to lease any lands which they or he may hold upon the trusts of my will, for not more than twenty-one years, at a rack-rent, subject to re-entry if the rent be in arrear for more than twenty-one days.

Power to grant husbandry leases;

—to grant leases for mining, &c.;

—to exchange;

—to partition;

—to sell;

73 *i*. I authorise my said trustees or trustee, at any time or times, with the consent of my wife, and, after her decease, at their or his discretion, to lease all or any parts of my real estates for any absolute term or terms of years in possession, not exceeding twenty-one years, at a rack-rent, [or for mining, building, repairing, or improving purposes, for such term or terms of years, for such considerations by way of premium or rent, and upon such conditions, as they or he shall deem expedient (*a*)]; And at any time or times, with such consent or at such discretion as aforesaid, to exchange all or any of such hereditaments for other freehold or copyhold hereditaments in England or Wales, to be held upon the same trusts; And to join in any partition of any such hereditaments. And, with such consent or at such discretion as aforesaid, to sell all

(*a*) [This power to grant mining leases is as effectual and complete as the long and elaborate forms that are ordinarily used; for a specimen of which, and of other special leasing powers, the reader is referred to the precedents of Settlements.]

or any parts of the hereditaments for the time being subject to the trusts of my will, together or in parcels, by public auction or private contract, subject to any special or other stipulations as to biddings, title, evidence of title, expenses, compensation, indemnity, security for purchase-money, or otherwise; With power to buy in or rescind or vary any contract relating to any such hereditaments, and to re-sell the same; [And with power, in exercise of any of the foregoing powers, to appoint any uses of any hereditaments]; The clear produce of such sale or sales, and the monies to be received for equality of exchange or partition, [and the premiums to be received upon any such building or other leases as aforesaid], to be invested by my trustees or trustee in the funds or on real securities in England or Wales, (and not in Ireland), upon trusts corresponding as nearly as may be with the trusts herein declared concerning the hereditaments which shall have been sold.

—investment of purchase-monies.

73 *k*. I AUTHORISE every person to whom a life estate in any hereditaments is hereby given, [or shall be appointed under any power hereinbefore given for that purpose], after her [or his] majority, and after her [or his] estate shall have fallen into possession, and my said trustees or trustee as to any hereditaments whereof for the time being there shall be no such adult tenant for life or no adult tenant for any greater estate, from time to time to lease the same or any parts thereof at a rack-rent, for any absolute term of years in possession not exceeding twenty years, so that the lessee or lessees execute a counterpart of such lease, and covenant to pay the rent, and to repair and keep in repair the demised premises, and to insure the demised buildings to the extent of three-fourths of the value thereof from damage by fire.

Common power to tenants for life or trustees to grant leases;

—lessee to repair and insure.

73 *l*. I EMPOWER every tenant for life or in tail in possession, being of full age, and my trustees or trustee during the minority of any tenant for life, in tail, or in fee, in possession, from time to time to lease all or any part or parts of my residuary real estate, for not more than twenty-one years, at a rack-rent, [or for mining, building, repairing, or improving purposes, for not more than ninety-nine years], and without fine.

Power to grant husbandry, [mining, and building] leases.

73 *m*[1]. AND I AUTHORISE my said trustees or trustee, [with the consent in writing of the person or persons who for the time being shall be entitled to any hereditaments for life or

Power to trustees to grant building, mining, or improving leases;

for any greater estate, and during the minority or minorities of such persons or person, at the discretion of my said trustees or trustee], from time to time to grant leases of such hereditaments or any parts thereof, for mining, building, repairing, or improving purposes, of such durations, for such considerations by way of premium or rent, and upon such conditions, as they or he shall deem expedient—

—power to partition, exchange, or enfranchise;

73 *m*[2]. And to join in any partition of any of such hereditaments, and in any such partition to consent to any arrangement for the payment or receipt or securing of any money for equality of partition—

73 *m*[3]. And to exchange any of such hereditaments for other freehold or copyhold hereditaments in England or Wales, in fee-simple or held upon renewable lease for lives or years or for an absolute unexpired term of not less than ninety-nine years, to be conveyed, as nearly as may be, to the uses and upon the trusts affecting the hereditaments so given in exchange immediately before such exchange, (subject, as to any renewable leaseholds, to the payment of the expenses), incident to each renewal out of the income thereof—

73 *m*[4]. And to enfranchise, or grant licenses to demise any copyhold or customary hereditaments held of any manor, which shall be subject to the foregoing powers—

—power to sell;

73 *m*[5]. And to sell all or any of such hereditaments, together or in parcels, by public auction or private contract, subject to any special stipulations as to biddings, title, evidence of title, expenses, compensation, arbitration, indemnity, postponement of payment of or security for purchase-money, or otherwise; With power to buy in or rescind or vary any contract relating to any of such hereditaments, and to re-sell the same.

—trusts for investment;

73 *m*[6]. And I direct, that the fines, premiums, monies for equality of partition or exchange, purchase-monies, and other gross sums to be received upon the exercise of any of the aforesaid powers, shall, with such consent or at such discretion as aforesaid, be invested by my trustees or trustee in the purchase of [freehold or copyhold hereditaments in England or Wales in fee-simple or held upon renewable leases for lives or years or for an absolute unexpired term of not less than ninety-nine years, *or*,] such hereditaments as are hereinbefore authorised to be taken in exchange, or in the public stocks or funds, or on real securities in England or Wales, and not in Ireland, to be respectively settled and held To and upon uses and trusts corresponding as nearly as may be with the uses and trusts herein declared concerning the hereditaments in respect

of which such monies shall have been received; With power for my said trustees or trustee, from time to time, [with such consent or at such discretion as aforesaid], to vary such investments. —power to vary investments;

73 *m* [7]. I AUTHORISE my trustees or trustee, in the exercise of any of the powers herein contained, to appoint any uses of any hereditaments; And in any exchange or purchase to submit to any special conditions, and to accept such title or titles as they or he shall think safe, whether strictly marketable or not. —power to appoint uses, and declaration as to title of purchased lands.

73 *n* [1]. PROVIDED ALWAYS, AND I HEREBY DECLARE, [that it shall be lawful for my trustees [or trustee] for the time being, *or*,] that it shall be lawful for [my said son, and] all and every [other] person or persons who, for the time being, shall be seised of or be in the actual possession of or entitled to the rents and profits of [the said manor of ——, or] of any [other] manor or manors for the time being, subject to the uses aforesaid, and for the said [*trustees*], or the survivor of them, his executors or administrators, during the minority or minorities of such person or of all or any of such persons, (but with the concurrence of the person or persons so entitled, if any, who shall have attained the age of twenty-one years), to regrant or renew, by copy of court-roll, any copyhold tenements within or held of such manor or manors, and also to fill up or grant and renew leases for lives or for terms of years determinable upon lives, of all such parts or parcels only of any lands and tenements, belonging to such manor or manors, as are now or at my decease, or at the time of the same becoming subject to the uses aforesaid, may be out upon any lease or leases for life or lives, or for any term or terms of years determinable upon any life or lives, so that there be reserved upon such last-mentioned lease or leases the old and accustomed rent or rents, heriots and services, or proportional parts thereof, for or in respect of the lands and tenements so to be granted, renewed, or leased. Special power to renew leases of copyholds and demesnes, in addition to the ordinary power of leasing;

73 *n* [2]. AND ALSO to lease all or any part of the lands, tenements, and hereditaments, for the time being subject to the uses aforesaid, for any term or terms of years not exceeding twenty-one years, to commence and take effect in possession and not in reversion, so that there be reserved by every such last-mentioned lease the most improved yearly rent or rents that, at the time of the granting thereof, can be reasonably obtained for the premises thereby demised; and that the lessee or —common leasing power;

lessees in every lease or leases lastly hereby authorised as aforesaid, be not made dispunishable for waste by any express words therein, and that the lessee or lessees of or in every such lease or leases as aforesaid do execute and deliver a counterpart or counterparts thereof respectively; But I declare, that a memorandum indorsed on such lease, and subscribed by the person or persons granting the same, acknowledging the receipt of such counterpart, shall be and be deemed to be conclusive evidence of the execution and delivery thereof.

—proviso as to evidence of execution of counterpart;

—power to grant licenses to copyhold tenants to demise.

73 n^3. Provided also, and I hereby further declare, that it shall be lawful for the person or persons to whom the power of leasing lastly hereinbefore contained is reserved and given, at any time or times, and from time to time, to grant to any customary or copyhold tenant or tenants of my said manor of ——, such license or licenses to demise or lease for any term not exceeding —— years in possession, all or any part of the messuages, lands, tenements, and hereditaments holden by such tenant or tenants respectively by copy of court-roll of the said manor, as the person or persons exercising this present power shall think proper; so that such person or persons accept and take the customary fines only for granting such license or licenses, and in all other respects conform to the custom of the said manor in relation thereto (*a*).

Power to trustees to sell and exchange;

74 a^1. Provided also, and I further declare, that it shall be lawful for the said [*trustees*], or survivors and survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of my will, at any time or times after my decease, [at their or his discretion, *or*,] at the request and by the direction of the person or persons [(if any)] who for the time being shall, by virtue of any of the limitations contained in my will, be in the actual possession of or entitled to the rents and profits of the said hereditaments hereinbefore devised, if such person or persons respectively shall be of full age, but if such person or persons respectively shall be under age, then during the minority or respective minorities of any such person or persons respectively, at the request and by the direction of his, her, or their guardian or guardians, such request to be signified by some writing or writings under hand and

(*a*) As the lord of a manor can only grant licenses to demise in respect of his estate, a power to this effect should always accompany limitations of a manor in strict settlement.

seal, (either alone or in conjunction with the other person or persons so entitled as aforesaid, if any, who shall be of full age, as the case may be), to dispose of and convey, either by way of absolute sale or in exchange for or in lieu of other hereditaments in fee simple in possession, to be situate in that part of Great Britain called England, or in the principality of Wales, all or any part of the said hereditaments hereinbefore devised, or which shall hereafter be subject to the limitations herein mentioned, and the inheritance thereof in fee simple, or for other my estate or interest therein, to any person or persons whomsoever, for such price or prices in money, or such equivalent in lands or hereditaments, as to the said trustees or trustee for the time being shall seem meet—

—and to enfranchise copyholds;

74 *a*[2]. And also to enfranchise any copyhold or customary lands or hereditaments holden of the said manor of ——, hereinbefore devised, or of any other manor or manors for the time being subject to the limitations aforesaid, for such price or prices or other equivalent as aforesaid—

—and join in making partition;

74 *a*[3]. And also, in the discretion and of the absolute authority of the said trustees or trustee for the time being, to join and concur with the person or persons for the time being entitled to the other undivided moiety or half part of the said messuages and hereditaments in the parish of ——, in the county of —— aforesaid, or to any other undivided share or shares of any hereditaments for the time being subject to the limitations aforesaid, or empowered to make a partition thereof, in making a partition or division of the same hereditaments respectively or any of them.

—to pay or accept money for equality of partition;

74 *a*[4]. And, on any such exchange or partition as aforesaid, to pay any sum or sums of money for equality of exchange or partition out of the trust-funds, if any shall be vested in such trustees or trustee by virtue of the trusts or powers hereinbefore contained, or to charge and secure the sum or sums of money so paid, or for the expenses of making such exchange or partition, with interest thereon, upon the hereditaments to be received or allotted as aforesaid, or to accept any sum or sums of money for equality of exchange or partition, or any similar securities or other real securities for the payment thereof, with interest.

—to revoke uses and appoint new uses.

74 *a*[5]. And that, for the purpose of effecting every or any such sale, disposition, exchange, enfranchisement, partition, and conveyance as aforesaid, it shall be lawful for the said trustees or trustee for the time being, at such request and by such direction and so testified as aforesaid, by any deed or

deeds, attested by one or more witness or witnesses, absolutely to revoke, determine, and make void all and every or any of the uses, trusts, powers, and provisions hereinbefore limited and expressed concerning the whole or any part or parts, parcel or parcels of the hereditaments hereinbefore devised, or any other hereditaments for the time being subject to the limitations aforesaid, and by the same or any other deed or deeds, attested as aforesaid, to limit, declare, direct, and appoint any use or uses, estate or estates, trust or trusts of the said premises, or any part or parts, parcel or parcels thereof, which it shall be thought necessary or expedient to limit, declare, direct, or appoint, in order to effectuate such sale, disposition, exchange, enfranchisement, partition, and conveyance as aforesaid.

—direction to invest monies in the purchase of other lands;

74 a^6. And I HEREBY DECLARE, that when all or any part of the said hereditaments hereinbefore devised shall be so sold or enfranchised for a pecuniary consideration, or any money shall be so received for equality of exchange or partition as aforesaid, the said trustees and trustee for the time being shall, with all convenient speed, lay out and invest the same money in the purchase of manors, lands, or hereditaments in fee simple in possession, to be situate somewhere in that part of Great Britain called England, or in the principality of Wales, held for a clear and indefeasible estate of inheritance, or in the purchase of copyhold lands of inheritance convenient to be held therewith or with the lands hereby devised, or for the time being subject to the limitations aforesaid, and which shall remain unsold by virtue of this present power; Yet so as that such purchase or purchases respectively be made with the consent in writing of the person or persons [(if any)] who would, under or by virtue of this my will, be for the time being entitled to the possession or receipt of the rents and profits of the said lands so to be purchased or received in exchange or allotted as aforesaid, in case the same were then actually purchased or received in exchange or allotted in pursuance of the powers aforesaid, if such person or persons respectively shall be of full age; But if any such person or persons respectively should be under age, then during the minority or minorities of any such person or persons respectively, with the consent in writing of his, her, or their guardian or guardians respectively.

—lands purchased or received in exchange or on

74 a^7. And moreover, that the said trustees or trustee for the time being shall settle and assure, or cause to be settled and assured, as well the manors, lands, and hereditaments so

to be purchased, as the manors, lands, and hereditaments to be received or taken in exchange or on any such partition as aforesaid, to such and the same uses, upon such and the same trusts, and for such and the same intents and purposes, and with, under, and subject to such and the same powers, provisoes, and declarations as are in and by this my will expressed concerning the said hereditaments hereinbefore devised, or as near thereto as the nature or quality of the premises and intervening circumstances will then admit of; AND FURTHER, that until the money arising by such sales or enfranchisements as aforesaid, or to be received for equality of exchange or partition as aforesaid, shall be disposed of in the manner hereinbefore mentioned, it shall be lawful for the said trustees and trustee for the time being, by and with the consent in writing of the person or persons [if any] who would, under or by virtue of my will, be for the time being entitled to the possession or receipt of the rents and profits of the hereditaments so to be purchased or received in exchange or on partition as aforesaid, in case the same were then actually purchased or received in exchange or on partition, in pursuance of the powers aforesaid, if such person or persons respectively shall be of full age: But if any such person or persons respectively should be under age, during the minority or minorities of any such person or persons respectively, with the consent in writing of his, her, or their guardian or guardians respectively, to place out such sum or sums of money at interest, either in the public stocks or funds of Great Britain, or upon real securities in England or Wales, (and not in Ireland), in the names or name of such trustees or trustee for the time being, and to alter and vary the said stocks, funds, and securities, as occasion shall require. AND I HEREBY DECLARE, that the dividends, interest, and annual produce arising from such stocks, funds, and securities, shall go and be paid to such person or persons, and be applied to and for such uses, intents, and purposes, and in such manner, as the rents and profits of the said hereditaments to be purchased therewith would go or be payable or applicable in case such purchase or purchases and settlement as aforesaid were then actually made.

partition to be conveyed to uses of settlement;

—power to invest monies arising from sale, exchanges, or partitions, upon security until purchase of lands;

74 a^8. PROVIDED ALWAYS, AND I HEREBY DECLARE, that any sale or sales to be made under the aforesaid power in this behalf may be made either by public auction or private contract, and with such restrictions and stipulations concerning

—discretionary power in reference to mode of sale, &c.

biddings, title, evidence, time, expenses, compensation, indemnity, arbitration, security for purchase-money, or otherwise, as the persons exercising the same shall think proper, And that any and every person and persons who is and are hereby empowered to enter into any contract or contracts for sale or purchase, or otherwise, shall have full power and authority to rescind or vary the same, as may be deemed expedient; And also to give valid and effectual receipts and discharges in writing for any purchase or other trust-monies, which shall effectually exonerate the person or persons paying the same from responsibility for the application thereof. (*See another form* (52 *d*[3]). *Add* (74 *b*)).

Declaration as to title to lands purchased or taken in exchange.

74 *b*. And I declare, that when any purchase or exchange shall be made of real estate, in pursuance of the power in that behalf hereinbefore contained, the person or persons making the same shall be exempt from all responsibility in regard to the title of the hereditaments so purchased or taken in exchange, provided that the same shall have been approved by counsel on behalf of such purchaser or purchasers, And that no trustees or trustee shall be answerable for the consequences of purchasing or taking lands in exchange, subject to any special or restrictive conditions of sale.

Power to sell, exchange, or partition; (*short form*); *See also* (53 *m*[2]);

74 *c*. I empower my trustees or trustee to sell or exchange or join in any partition of any hereditaments which for the time being may be subject to any uses or trusts limited by my will, or any part thereof; And, for that purpose, to appoint new uses of the same, and to make any special or other conditions or stipulations; Such sale, exchange, or partition to be made with the written consent of such adult person or persons as for the time being shall be entitled under my will to any estate of freehold in possession in all or any part of such hereditaments, or, if there be no such person, at the discretion of my trustees or trustee. And my trustees or trustee shall, with such consent or at such discretion as aforesaid, invest the monies arising from such sale, exchange, or partition, or so much thereof as they or he shall not in their or his discretion have applied in discharging or reducing any incumbrance on such hereditaments as shall remain subject to the trusts aforesaid, in the purchase (subject to such stipulations or conditions of sale or under such title as my trustees or trustee in their or his absolute discretion shall think safe or expedient to be accepted) of other freehold or

—investment of purchase-monies (after paying off incumbrances) in purchase of lands, and, in the meantime, in the funds.

copyhold hereditaments in fee-simple in England, and, in the meantime, in the funds or on real security; such hereditaments and securities to be respectively settled and held upon uses and trusts corresponding as nearly as may be with the uses and trusts hereinbefore limited of and concerning the hereditaments which shall be so sold or exchanged.

Power conferring on a person an option to purchase part of the settled estates, the price to be settled by arbitration;

74 *d.* PROVIDED ALWAYS, AND I HEREBY DECLARE, that the said [*donees of power*], or the survivor of them, or the executors or administrators of such survivor, shall, as soon as conveniently may be after my decease, give notice in writing to my friend, [*name*], that I have given to him (as I hereby do) the option of purchasing my messuage or tenement called ——, and the said lands and hereditaments thereunto belonging; and if the said [*name*] should be willing to make such purchase, and should contract and agree for the same with the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, within the space of twelve calendar months next after such notice shall be so given (which contract or agreement the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, are and is hereby authorised and required to enter into with him accordingly), then, and in such case, as soon as conveniently may be after such contract or agreement shall be so entered into (unless the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, should have agreed with the said [*name*] as to the amount of the purchase-money to be paid for the said premises), a valuation shall be made of the said messuage or tenement called ——, and the said lands and hereditaments thereunto belonging, by two competent persons, one of them to be chosen by the said [*name*], and the other of them by the said [*donees*], or the survivor of them, or the executors or administrators of such survivor; and if such two persons should disagree in the premises, then by a third person or umpire, to be nominated by the two persons so first chosen, whose decision shall be final; and then and in such case it shall be lawful for the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, and they and he are and is hereby directed and required, upon payment to them or him by the said [*name*], his heirs or assigns, of the sum of money agreed to be paid for the purchase of the said messuage or tenement and other hereditaments, or at which the same shall be so valued, by any deed or deeds attested by one or more wit-

ness or witnesses, to revoke and make void all and every the uses, trusts, estates, powers, provisoes, and declarations hereinbefore limited or expressed concerning the said messuage or tenement called ——, and the said lands and hereditaments thereunto belonging (subject, nevertheless, and without prejudice to any lease or leases which may have been granted thereof, or of any part thereof, under the power hereinbefore in that behalf contained), and to limit and appoint the same premises, with the appurtenances (subject and without prejudice as aforesaid), To THE USE of the said [*name*], his heirs and assigns for ever, or to such other uses as he or they shall direct or appoint. AND I DECLARE, that the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, shall stand and be possessed of and interested in the money so to be paid to them or him by the said [*name*], his heirs or assigns, for the purchase of the said last-mentioned messuage or tenement and other hereditaments as aforesaid, upon and for such and the same trusts, intents, and purposes, and with, under, and subject to such and the same powers, provisoes, and declarations as are hereinbefore expressed and declared of or concerning the money which may arise from the sale of any of the hereditaments hereinbefore devised and appointed, or expressed and intended so to be, which may be sold under or by virtue of the general power of sale hereinbefore contained. AND I DECLARE, that the receipt or receipts in writing of the said [*donees*], or the survivor of them, or the executors or administrators of such survivor, for the purchase-money for the said messuage or tenement called ——, and the said lands and hereditaments thereunto belonging, shall effectually discharge the said [*name*], his heirs, executors, administrators, and assigns respectively, from being answerable or accountable for the loss, misapplication, or non-application, or being in anywise bound or concerned to see to the application of the money therein expressed and acknowledged to be received.

—declaration of trusts of purchase-money.

Power to partition among devisees in common;

75 *a*. I AUTHORISE my said trustees or trustee, in their or his discretion, during the minority of any person actually or presumptively entitled to any share of any real estates under my will, and with the consent in writing of such adult and competent person or persons (if any) as shall be interested therein, to allot, by way of complete or partial partition, any part or parts of any of such real estates in severalty to any person or persons, as and for the share or shares, or part or

parts of the share or shares, of such person or persons; and, for the purposes of such partition, and with or without the aid of a surveyor or surveyors, to determine the value of such allotment or allotments; [And to appoint any uses]; And to make any provision for equality of partition, by charge upon or mortgage of any allotment or allotments, or out of any part of my residuary real or personal estate, [*or*, out of any other lands and hereditaments subject to the trusts of this my will, and available for the purpose.] (*See the form* (52 l^4)).

75 *b*. PROVIDED ALSO, AND I HEREBY DECLARE, that it shall be lawful for every person who, under the limitations hereinbefore contained, shall for the time being be in the actual possession of or entitled to the rents and profits of any of my said manors and other hereditaments, and shall not be seised of or entitled to an estate in tail male or in tail general of and in the same, at all seasonable times in the year, to fell, cut down, take, carry away, and remove from all or any part of the said lands and hereditaments of which such person respectively shall be so in possession, or to the rents and profits of which he or she shall be so entitled as aforesaid, sufficient timber and wood for the erecting or making any necessary buildings, gates, stiles, or fences upon all or any part of the same lands and hereditaments respectively, or for the repair of any of the houses, outhouses, edifices, or buildings, or any gates, stiles, or fences now standing or being upon all or any of the same lands or hereditaments, so as to keep the same in good and tenantable repair, but not for any other purpose whatsoever; it being my intention that no timber whatsoever shall in any case be sold or disposed of or cut from off the same premises otherwise than for the purposes aforesaid.

Power for tenants for life to fell timber for repairs.

75 *c*. AND [WHEREAS I have begun to make considerable alterations and improvements in my mansion-house at ——, which may not be completed at my decease (*a*). Now in such case I HEREBY AUTHORISE AND EMPOWER my trustees for the time being to carry on and complete the said alterations and improvements, or such part thereof as they shall think

Authority to trustees [to complete alterations in testator's mansion-house, and generally] to improve his estate; (*limit-*

(*a*) This clause confers on the trustees a discretion in an event in which there would be an obvious inconvenience from their want of it. It often happens that trustees are obliged to resort to a court of equity, in consequence of the testator having neglected to arm them with discretionary powers adapted to all possible circumstances.

ations for remote vesting).

proper, out of the proceeds of my personal estate, or any other monies which shall come to their hands by virtue of my will.] And I [further] authorise and empower my said trustees from time to time to expend such sum or sums of money as they shall deem expedient in the repair and improvement of any of the messuages and other buildings, lands, and hereditaments hereby devised, and also of the messuages, buildings, lands, and hereditaments to be purchased by virtue of the trusts and powers aforesaid, and also in the erection of any new and additional messuages and other buildings on any such lands and hereditaments devised or to be purchased as aforesaid, and generally to make such expenditure and outlay in the improvement and amelioration of the trust estate during the continuance of the trusts hereby created, as my said trustees for the time being shall think proper and expedient (*a*).

Power to trustees to appoint bailiffs, &c.

75 *d.* Provided also, and I further authorise and empower the trustees for the time being of my will, from time to time during the continuance of the trusts hereby created, in their absolute discretion, to appoint, retain, and employ such bailiffs, stewards, receivers, clerks, or other persons to aid and assist them in the care and management of my said real estates, and in receiving and paying the rents, income, and produce thereof, or any part thereof, or otherwise in the performance and execution of the several trusts and purposes hereinbefore declared concerning my real or personal estate, as to the said trustees for the time being may seem best, and also to pay or allow to all such agents, stewards, receivers, clerks, and other persons so appointed, retained, and employed from time to time, such salary or salaries, allowances, or other compensation, as may or shall have been usually paid or allowed by me, or otherwise as the said trustees for the time being shall in their discretion think fit.

Tenants for life to repair and insure;

75 *e.* I direct, that each tenant for life or for any less estate of any hereditaments, shall, during her or his estate, keep the buildings thereon in substantial repair (*b*), and insured in some respectable office or offices of insurance, in the names

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(*a*) This clause gives great latitude of discretion; but, where the vesting is long protracted, it is of course important that the trustees should have ample powers of management.

(*b*) [In this case the estates for life will not, of course, be limited sans waste.]

or name of my trustees or trustee for the time being, against damage by fire, to the full value thereof; and that the monies to be received under every such insurance shall be applied in reinstating the premises in respect whereof the same shall become payable; And that, if any such person should neglect to effect such repairs as aforesaid within six calendar months after being thereunto requested in writing by my said trustees or trustee, or to effect such insurance, or to produce to my said trustees or trustee, upon demand, the receipt for each premium thereon, within fourteen days after the same shall have fallen due, it shall be lawful for (but not incumbent on) my said trustees or trustee, out of any trust-monies in their or his hands, to effect such repairs, or to effect or keep on foot such insurance, and to deduct the expenses thereof, with interest thereon after the rate of 5*l.* per centum per annum, from any monies which shall then or afterwards be payable to such person, or to recover such expenses and interest by distress or entry upon and perception of the rents and profits of any hereditaments to which such person shall be entitled for any estate or interest under my will.

—in default trustees may repair and insure, and recover costs by distress and entry.

75*f*[1]. I EMPOWER my trustees or trustee, during the minority of any tenant for life, [in tail] or in fee, entitled to the present possession, or to the rents and profits, of any hereditaments under my will [*or*, during the minority of any person actually or presumptively entitled to any share of or interest in any hereditaments under my will, but subject to any prior interest therein], [*or*, during the minority of the said [*devisee*]], to receive such rents and profits, and to manage such hereditaments, and to make arrangements and settle accounts with tenants, to cut timber for repairs or sale, to insure against damage by fire, to pay all or any charges either of annual or gross sums, and all other outgoings, and to apply all or any part of the clear surplus income from such hereditaments towards the maintenance and education of the person or persons entitled thereto, [*or*, of the said [*devisee*]], and to invest the remainder (if any) of such income in the funds or upon real securities in England or Wales, with power to resort to such accumulations for the maintenance or education of the person or persons for the time being actually or presumptively entitled thereto, [*or*, of the said [*devisee*]]; and subject to which power I DIRECT that such accumulations shall follow the distribution of the hereditaments from which the

Power to trustees to manage and receive rents during minorities of tenants for life, in tail or in fee, [or of a particular devisee], for their maintenance;

same shall arise. (*See other forms* (71 *b*[3]), (72 *b*[8]). *Add power of advancement* (75 *f*[2])).

—to advance;

75 *f*[2]. And also with the consent in writing of the [father or] surviving parent or guardian or guardians of any minor, and if there be no such parent or guardian, at the discretion of my trustees or trustee, to convert into money by sale, mortgage, or otherwise, and apply for the advancement in life of any such minor not more than one-half of the amount or estimated value of such hereditaments [or real or personal property] as he or she may be actually or presumptively entitled to under my will.

—trustees may depute their powers of management to guardians.

75 *f*[3]. Provided, nevertheless, that it shall be lawful for my trustees or trustee, from time to time, to authorise and empower, by writing under their or his hands or hand, or to permit and suffer any parent or guardian of any minor entitled to the present possession or rents and profits of any hereditaments under my will, to receive such rents and profits, and to manage such hereditaments, and to make arrangements and settle accounts with tenants, to cut timber for repairs or sale, to insure against damage by fire, to pay all or any charges either of annual or gross sums, and all other outgoings, and to apply all or any part of the clear surplus income from such hereditaments, towards the maintenance and education of such minor; the remainder (if any) of such income to be invested in the names or name of my trustees or trustee, and to be applicable as aforesaid.

Authority to trustees to permit testator's son to reside in his mansion-house;

75 *g*. Provided always, that in case my trustees for the time being should find it impracticable or shall deem it inexpedient to let my messuage or mansion-house at ——, and the garden and pleasure-grounds thereto belonging, during the said term of twenty-one years commencing from my decease as aforesaid, it shall be lawful for such trustees, if they should think proper, to permit my eldest or only son for the time being to reside in and occupy the said mansion-house, garden, grounds, and premises, during the whole or any part of the said term of twenty-one years, without paying any rent or other compensation for the same; such son nevertheless, during his residence as aforesaid, keeping the said premises in good order, repair, and condition, and paying all taxes and other outgoings in respect thereof, including the expense of keeping on foot a policy of insurance in the sum of £——, to be effected in the names of my trustees.

—son to repair and insure.

DEVISES OF COPYHOLDS.

76 *a*. I GIVE AND DEVISE all my copyhold messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy (except the estates vested in me as mortgagee or trustee), To THE USES, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisoes, conditions, and declarations hereinbefore limited and expressed concerning my manor and other freehold hereditaments hereby devised (*a*), except the clause declaring or rendering the estates of tenants for life unimpeachable for waste, [and also except the estates so as aforesaid vested in the said trustees upon trust for preserving contingent remainders], and also except so much of the power to grant leases hereinbefore contained as would authorise and enable the person or persons exercising the same to grant any lease or leases of the copyhold hereditaments hereinbefore devised without the licence of the lord or lords, or lady or ladies of the manor or respective manors of which the same may happen to be holden, in conformity to the custom thereof, which licence the person or persons exercising such power is or are hereby directed to obtain, previously to the granting of any lease or leases of the said copyhold hereditaments.

Devise of copyholds to the uses declared of the freeholds.

76 *b*. I DEVISE all my copyhold hereditaments at —— To SUCH USES as [*devisee*], of &c., shall by deed or will appoint; And, subject thereto, To THE USE of the said [*devisee*], his heirs and assigns for ever (*b*).

Devise of copyholds, with power of appointment.

(*a*) The reason why the testator's copyhold estates are devised by a separate clause, instead of being blended with the freeholds in one devise, are sufficiently explained by the clause itself. Where freeholds and copyholds are devised together to limitations in strict settlement, to exempt the copyholds from the parts not applicable to them greatly increases the complexity of the devise, and requires much additional care in framing the limitations. [It is to be observed, however, that no real mischief could arise from subjecting the copyholds in terms to all the limitations and powers affecting the freeholds. The only effect would be, that such of the powers as are contrary to the custom would be, to that extent, invalid; but, for the sake of accuracy and to avoid misleading the parties claiming under the will, it is, of course, better to express the distinction. The limitation to trustee to preserve contingent remainders may properly be extended to copyholds.]

(*b*) [Under a limitation of copyholds to such uses as the devisee shall

Devise of copyholds for life and in remainder, with power of appointment.

76 *c.* I DEVISE all my copyhold hereditaments at —— To such person or persons, and for such estate or estates, determinable on the death of [*devisee for life*], of &c., or sooner, as the said [*devisee*] shall by deed appoint; And, subject thereto, To THE USE of the said [*devisee for life*], during his life, With remainder To SUCH USES as [*devisee in remainder*] (*a*) shall by deed or will appoint; And, subject thereto, To THE USE of the said [*devisee in remainder*], his heirs and assigns for ever.

Devise of copyhold to A. in fee, subject to a trust for B. during her life.

76 *d.* I DEVISE all my copyhold messuage and hereditaments at ——, which were devised to me by my uncle, [*name*], unto my son, [*name*], his heirs and assigns for ever, IN TRUST, nevertheless, for my wife, and to permit her to occupy or receive the rents and profits thereof during her life; And, subject thereto, for the absolute benefit of my said son, his heirs and assigns (*b*).

BEQUESTS OF LEASEHOLDS.

Bequest of leasehold messuage in trust for sister for life, and then for daughter.

77 *a.* I GIVE to the said [*trustees*] ALL THAT my leasehold messuage or tenement, situate &c., with the garden and appurtenances thereto belonging, now in the occupation of [*tenant*], To HOLD the same unto them the said [*trustees*], their executors or administrators, for all the estate, term, and interest which I shall have therein at the time of my decease, upon the trusts following, (that is to say), UPON TRUST, from time to time, out of the yearly rents and profits of the same leasehold premises, to pay and perform the rents and covenants reserved and contained by and in the lease by which the same premises are held, and to pay the residue of such rents and profits unto my sister, [*name*], or her assigns, during her natural life; and after her decease, then UPON TRUST to

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appoint, he may transfer the right to admittance, by way of mortgage or sale, without the expense of a surrender. And if he sells the estate before the lord's right to enforce admittance has accrued, the purchaser may be admitted at once under the will. Vide ante, p. 604.]

(*a*) [A person in esse. The power would otherwise, unless restricted by apt words, be void for remoteness.]

(*b*) [The object of this mode of disposition is, of course, to save the expense of a double admittance. Care should be taken by the cestui que trust for life, that the devisee, if he be also heir, is admitted in the character of devisee, so that the rolls may carry notice of the will and the trust.]

assign the said leasehold premises to my daughter, [*younger daughter*], her executors or administrators, for her or their own use and benefit.

77 *b*. I GIVE AND BEQUEATH to the said [*trustees*], their executors, administrators, and assigns, ALL THAT my leasehold messuage situate &c., and the stables, buildings, and other appurtenances thereunto belonging, for all the estate, term, and interest which I shall have therein at the time of my decease, UPON TRUST to permit and suffer my said wife to reside in and occupy the said leasehold premises so long as she shall think proper, she paying the ground-rent and taxes payable in respect of the same, and keeping the said premises in good and tenantable repair, and insured against loss or damage by fire during the period of such residence; and from and after the decease of my said wife, or so soon as she shall decline or for the space of six calendar months cease to reside in and occupy the said leasehold premises (*a*), then I DIRECT that my said trustees or trustee for the time being shall sell and dispose of the said leasehold messuage and premises, either by public sale or private contract. (*Power to sell under special conditions, &c.* (52 *r*^{2})). PROVIDED ALWAYS, that no purchaser of the said leasehold premises shall be bound to inquire or take notice, whether my said wife has so declined or ceased to reside in and occupy the same or not. AND I DIRECT, that the money to arise by such sale or sales shall become and constitute part of my general residuary personal estate. AND I FURTHER EMPOWER the said trustees or trustee, in their or his discretion (notwithstanding the trusts aforesaid), to postpone the sale of the said leasehold premises so long as they or he shall think proper, and during such

Bequest of leasehold messuage to trustees to permit his wife to occupy it for her residence; and after her decease, or if she should decline to reside, upon trust to sell same;

—monies arising from sale to form part of personal estate.

(*a*) Where a testator imposes on a devisee an obligation to reside, it is sometimes a question what length of continuous absence amounts to a breach of the condition.

What length of non-occupation is a breach of a condition requiring residence.

In the case of *Doe* v. *Steward*, 3 Nev. & Man. 372, a testator bequeathed to A. a leasehold messuage, in case he should so long live and continue to inhabit the house; and, after his decease, or giving up the possession, or in case he should mortgage the same, then over. A. went to sea, leaving his wife and family in the occupation of the premises, and was absent six months. A commission of bankrupt issued against him. It was held that the going to sea did not amount to a "giving up" of the premises; and the Court considered it to be doubtful whether his being turned out of them by the assignees under the bankruptcy satisfied these words, which seemed to imply a voluntary desertion.

postponement to pay the rents and profits thereof to the person or persons for the time being entitled to the income of my residuary personal estate.

Bequest of renewable leaseholds to trustees;

77 *c* [1]. I GIVE AND BEQUEATH my leasehold messuages, lands, and tenements, [*parcels*], with their appurtenances, unto the said [*trustees*], their executors, administrators, and assigns, for and during all such estate or interest as I shall have or be entitled to therein at the time of my decease, upon the trusts hereinafter declared concerning the same, (that is to say),—

—to pay rents, and perform covenants of lease;

77 *c* [2]. UPON TRUST, in the first place, from time to time, by and out of the rents and profits of the same premises, to pay, satisfy, and perform the several rents, reservations, and covenants which are reserved and contained in the lease or leases now subsisting of the same premises respectively, or which in and by any renewed lease or leases thereof, to be from time to time taken, shall be reserved and contained, on the part of the lessee or lessees to be paid and performed.

—to raise money to renew out of the rents or by mortgage;

77 *c* [3]. AND, UPON FURTHER TRUST, from time to time, by and out of the rents and profits of the said leasehold premises, or by mortgaging the same or any part thereof, to raise such sum or sums of money as shall be sufficient to defray the expenses of the fines and other charges of renewing the now subsisting lease or leases, or any other lease or leases hereafter to be taken of the same premises, when and as often as the same shall expire, or in the usual course or custom of such leases shall become renewable, And from time to time to renew or to endeavour to renew the same accordingly. AND I EMPOWER my said trustees and trustee for the time being, for the purposes aforesaid, to surrender the present or any future lease or leases to be taken of the said leasehold premises when and as the same shall become renewable as aforesaid. NEVERTHELESS, I HEREBY DECLARE, that the trusts and directions hereinbefore contained shall not render it imperative or obligatory on the said trustees or trustee to renew the lease or leases by which the said leasehold premises shall for the time being be holden when and as the same shall become renewable, if the lessors shall demand or require a fine or premium for the granting thereof which my said trustees or trustee shall deem to be excessive and unreasonable (*a*).

—and to renew;

—trustees not to be bound to renew;

As to giving trustees a discretion in regard to renewals.

(*a*) It seems advisable, that clauses directing tenants for life or trustees to renew leases should not be so framed as to make it imperative on them to submit to unreasonable terms.

77 *c* [4]. And I further declare, that it shall not be incumbent on any mortgagee or mortgagees of the said leasehold premises to inquire into or ascertain the necessity or propriety of any mortgage or mortgages made or executed or purporting to be made or executed by my said trustees or trustee by virtue of the power in that behalf hereinbefore contained. —indemnity to mortgagees;

77 *c* [5]. And I direct and declare, that, subject to the aforesaid trusts, my said trustees and trustee shall stand and be possessed of the said leasehold premises, In trust for such son of mine living at the time of my decease as shall first or alone attain the age of twenty-one years, for his absolute use and benefit. And if I should have no son living at my decease who shall attain the age of twenty-one years, then In trust for such daughter of mine living at my decease as shall first or alone attain the age of twenty-one years, or marry under that age with the consent in writing of her guardian or guardians for the time being, for the absolute use and benefit of such daughter; yet so that an elder daughter attaining the age of twenty-one years, or marrying under that age with such consent as aforesaid, shall take in preference to a younger daughter who may happen to marry with such consent as aforesaid before such elder daughter shall so attain the age of twenty-one years or marry. And I declare, that if I should not have any son living at my decease who shall attain the age of twenty-one years, or any daughter who shall attain the age of twenty-one years, or marry with such consent as aforesaid, then and in such case, as to, for, and concerning the said leasehold premises, from and after such default or failure of children of mine as aforesaid, In trust for my said wife, [*name*], for her absolute use and benefit.

—subject to the aforesaid trusts,

in trust for such son of testator as shall first attain twenty-one;

—if no such son,

in trust for such daughter as shall first attain twenty-one or marry;

—if no such son or daughter,

in trust for his wife absolutely;

77 *c* [6]. Provided always, and I hereby direct, that in the meantime and until the said leasehold premises hereinbefore by me bequeathed shall vest absolutely, under the trusts aforesaid, in any son or daughter of mine, or until there shall be a failure or default of children of mine, entitled in expectancy under the trusts aforesaid, my said trustees or trustee shall from time to time receive the rents and profits of the said premises, and lay out and invest the same or so much and such part thereof as shall not be wanted for any of the purposes hereinbefore declared concerning the same, in their or his names or name in any of the public stocks or funds of Great Britain, or at interest upon real securities in England or Wales, and shall receive the dividends, interest, and annual

—power to accumulate rents during minorities, and to invest the accumulations in the purchase of lands;

produce of the last-mentioned stocks, funds, and securities, and lay out and invest the same in or upon other stocks, funds, or securities of the like nature, (with power to alter and vary the said stocks, funds, and securities from time to time as occasion shall require), And shall from time to time repeat such investments, so that all the resulting income and produce for the time being may, during such suspense as aforesaid, accumulate in the way of compound interest, And shall, at the end of such period of accumulation, convert the said accumulated fund into money, and lay out or invest such money in the purchase of copyhold estates of inheritance, to be situate in England or Wales, or of copyhold estates of inheritance convenient to be held therewith or with the estates hereinafter devised.

—to be held on trusts of settled estates;

77 *c*[7]. And I DIRECT AND DECLARE, that my said trustees and trustee shall stand seised and possessed of the estates so to be purchased as aforesaid, to uses, upon trusts, and for intents and purposes corresponding with the uses, trusts, intents and purposes hereinafter expressed concerning the freehold and copyhold hereditaments hereinafter devised, or as near thereto as the nature or quality of the tenure and intervening circumstances will then admit of.

—power to apply any part of the accumulations during minorities towards paying the fines on renewals.

77 *c*[8]. Provided always, and I DECLARE, that it shall be lawful for my said trustees or trustee for the time being, at any time or times during such period of accumulation, or after the determination thereof, to apply all or any part of the said accumulated fund in payment of the fine or fines or other expenses of any such renewal or renewals of lease as aforesaid, or of any mortgage debt or debts which shall or may have been previously created for the purpose of enabling my said trustees or trustee to effect the same renewal or renewals respectively. (*Add powers to lease and to sell* "the said leasehold premises," *and invest in the purchase of lands* (73 *m*[1]), (73 *m*[5]), (73 *m*[6])).

Renewable leaseholds upon trusts for renewal, and to go with freeholds devised in strict settlement;

77 *d*[1]. I GIVE all that messuage and hereditaments at ——, which at my decease I may hold under any lease from the Dean and Chapter of ——, unto my said trustees, their executors, administrators, and assigns, Upon trust that my trustees or trustee for the time being will, from time to time, out of the income therefrom, pay the rents and perform the covenants on the lessee's part to be paid and performed, and also, from time to time, if and as and when my trustees or trustee shall deem expedient, procure a renewal of the lease

thereof which for the time being may be in force, and for that purpose surrender such lease, and raise the costs of such renewal either out of the income from the said hereditaments or by mortgage thereof or of any part thereof; any such mortgage to contain such power of sale (if any) and such other powers as my trustees or trustee may deem expedient; and such mortgage or mortgages to be, from time to time, and as soon as may be, paid off out of the income from the said leasehold hereditaments.

—power to insure lives;

77 *d*[2]. PROVIDED, that it shall be lawful for my trustees or trustee, if they or he should think fit, out of the income from the said hereditaments, to effect and keep on foot an insurance on the lives for which any subsisting lease shall be granted, or any of them, to such amount as my trustees or trustee shall estimate as the probable expense of obtaining a renewal thereof on the failure of such lives or life, and to apply the proceeds of such insurance in obtaining such renewal, and to apply any surplus of such proceeds as if the same were income from the said hereditaments. PROVIDED ALSO, that, if my trustees or trustee should deem it expedient either to surrender any lease and obtain a renewal thereof, or to abstain from obtaining a renewal of any lease which may have expired, the produce of any such insurance shall be invested either in the purchase of freehold or copyhold lands of inheritance in England or Wales, to be conveyed to such uses and upon such trusts as are hereinbefore limited concerning the said freehold hereditaments at ——, or in the funds, or on real securities in England or Wales, (and not in Ireland), to be held upon trusts corresponding as nearly as may be with the trusts hereinafter declared concerning the said leasehold messuage and hereditaments at ——.

—leaseholds to be held,

77 *d*[3]. AND my trustees or trustee shall be possessed of the said leasehold messuage and hereditaments for such original and renewed estates—

upon trusts corresponding with uses of freeholds in settlement;

77 *d*[4]. UPON TRUSTS corresponding as nearly as may be with the trusts [*or*, uses] herein limited concerning the said freehold hereditaments at ——; BUT so that, on the death of any person hereinbefore made tenant in tail by purchase of the said freehold hereditaments, or of any share thereof, under the age of twenty-one years and without issue inheritable to the estate tail which such person shall have so taken, the said leasehold hereditaments, or the corresponding share thereof, shall be in trust for the person or persons on whom such free-

hold hereditaments, or such share thereof, shall devolve. (*Or as in the next form. See also* (10 *b*)).

—trusts of leaseholds in strict settlement.

77 *d*[5]. IN TRUST for the person or persons, successively, who for the time being shall be entitled, under the limitations hereinbefore contained, to the freehold in possession of my said freehold hereditaments at ——, and in the like shares and proportions, and subject to the like trusts and powers in all respects, as nearly as may be; BUT so that no such person shall take any interest in the said leasehold hereditaments, or any share thereof, beyond the term of his or her life, until he or she shall have effectually barred or destroyed such estate tail and remainders over as are hereinbefore limited in respect of the freehold hereditaments to which he or she shall be so entitled, and as shall not have previously expired or failed, or until the expiration of twenty-one years from the death of the survivor of such of the persons mentioned by name in my will, and such of the issue of my paternal grandfather as shall be living at my death, whichever shall first happen.

CONDITIONS.

Provisions for wife to be in lieu of dower.

78 *a*. I DECLARE, that my wife, if she claim any dower or free bench out of any of my lands, shall not be entitled to any benefit under my will.

Provision for wife to be in satisfaction of dower.

78 *b*. AND I DECLARE, that the provision hereby made for my said wife shall be in lieu and full satisfaction of all dower, thirds, and free bench, which at common law, or by any custom, she can, shall, or may, or otherwise might, claim or be entitled to have, in, from, or out of any of the lands, tenements, or hereditaments of which I have been, or now am, or shall at any time hereafter be, seised for any estate of inheritance, or to which free bench is incident; and that she shall, if requested, at the cost of the person requiring the same (*a*),

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Remarks upon the dower clause.

(*a*) This, it will be observed, is the ordinary clause applicable to dower: indeed, if the testator were married on or prior to the 1st of January, 1834, the dower of his widow would be regulated by the old law; and even if the marriage were subsequent, the clause in the text would not be materially varied in expression, though it would differ considerably in operation; the difference being, that widows not within the late act are merely put to their election, and might, in spite of the

release the same lands, tenements, and hereditaments, and my trustees in respect thereof, from all right and title thereto.

78 *c.* PROVIDED ALWAYS, AND I HEREBY DECLARE, that the said annual sum or yearly rent-charge of £——, hereinbefore limited to my said wife and her assigns during her life, and the said annual sum or yearly rent-charge of £—— hereinbefore limited to my said wife and her assigns during her widowhood, are so respectively limited to her and them as aforesaid, upon condition that she my said wife will and shall, at her own costs and charges, within the period of —— calendar months next after my decease, by such ways or means as by my said trustees or trustee for the time being, or their or his counsel, shall be directed or required, surrender and yield up, or otherwise release or dispose of the life interest of her my said wife, under the settlement executed on our marriage, in the several sums of stock in the same settlement mentioned or comprised, so and in such manner, that the interest, dividends, or annual produce of the same several sums of stock may from time to time, during the life of her my said wife, be received and enjoyed by the person or persons who would for the time being have been entitled thereto in case she were then dead. AND I HEREBY EXPRESSLY DECLARE, that, in case my said wife should refuse or neglect to make and execute such release or surrender of her life interest in the said trust funds as aforesaid, within the period aforesaid, and should persist in such refusal or neglect for the further period of —— days after a demand or request in

Declaration that provision made for wife is upon condition of her giving up life interest under her marriage settlement;

—in case of her neglect to do so after notice, the rent-charges to cease.

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clause in question, choose to take their dower and renounce the benefits of the will. On the other hand, the recent act, by placing dower under the testamentary dominion of the husband, has invested the clause with an obligatory effect. It will be seen, that, if the provision for the widow is out of real estate liable to dower, she would (supposing the act to apply to her in reference to the period of her marriage) be deprived of dower without any declaration to this effect; but if the provision is made out of personalty only, or out of real estate not liable to dower, such an excluding declaration now is requisite. But, although, for the reason suggested, clauses of this nature will probably be retained to a considerable extent in wills, they must be wholly disused in settlements, as it will be no less unnecessary for a man about to marry to stipulate for the exclusion of dower, than it now is to contract for the power of excluding his wife from her share in his personal estate under the statutes of distribution. With respect to both, positive contract will be requisite in order to establish the widow's claim in opposition to her husband's testamentary or other disposition.

writing, delivered to my said wife or left for her at her last or usual place of abode, by or on the part of my said trustees or trustee, then and in such case, from and immediately after the expiration of the said period of —— days, the said several annual sums or yearly rent-charges respectively hereinbefore limited to my said wife, or such of them as shall be then subsisting, shall absolutely cease and determine, notwithstanding that my said wife shall or may, at any time thereafter, be willing and desirous to make and execute, or actually shall make and execute such release or surrender as aforesaid, any rule of equity to the contrary notwithstanding (*a*).

Condition as to release of claims.

78 *d.* I DECLARE, that my wife shall not, nor shall any child of mine, take any benefit under my will, (other than the benefit of any provision for maintenance or advancement during infancy), until she or he has, to the satisfaction of my trustees or trustee, confirmed my will in all respects, and released all her or his demands in opposition thereto or against my real or personal estate; And in case my wife or any child or

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Remarks upon conditions requiring performance of an act by devisee or legatee.

(*a*) If a testator really intends to make compliance with the condition a sine quâ non, the intention should be placed above the possibility of misconstruction, by explicit declaration, as in the text, since points of this nature have occasioned much litigation.

Where there is no gift over, or substituted disposition, in the event of non-compliance with the testator's injunction, and that injunction relates only to the payment of money, equity will relieve against forfeiture on subsequent payment of principal, interest, and costs: *Underwood* v. *Swain*, 1 Rep. Ch. 161; *Grimstone* v. *Lord Bruce*, 2 Ves. sen. 492; [*Paine* v. *Hyde*, 4 Beav. 468.] And this relief has been sometimes, with more doubtful propriety, extended to other conditions not equally susceptible of compensation, as where the testator bequeaths a sum of money on the condition (as in the text) of the legatee executing a release within a given time: *Taylor* v. *Popham*, 1 B. C. C. 168; *Simpson* v. *Vickers*, 14 Ves. 341; *Hollinrake* v. *Lister*, 1 Russ. 500. In these cases the legatee has been allowed to take the legacy on his performing the act *after* the lapse of the prescribed period.

Where, however, there is an express gift over, in default, equitable interference is prevented by the claims of the substituted object of gift, who obviously is entitled to equal consideration with the original devisee or legatee. In such cases, therefore, equity is compelled, by its own principles, to remain neuter, leaving the prior devisee or legatee to the consequence of his contumacy or laches: *Cleaver* v. *Spurling*, 2 P. W. 426; *Simpson* v. *Vickers*, 14 Ves. 341. See also *Tulk* v. *Houlditch*, 1 Ves. & Bea. 248; *Burgess* v. *Robinson*, 1 Madd. 172, 3 Mer. 7, 1 Jarm. Wills, 804.

children of mine should not execute such confirmation and release within three calendar months after being thereto requested in writing by my trustees or trustee, I DIRECT that my will shall take effect as if she, he, or they were not mentioned therein.

Children to forfeit all benefit under the will, unless they confirm a sale by testator of an estate comprised in his marriage settlement.

78 *e*. WHEREAS, I have contracted for the sale of certain hereditaments at ——, which were, by the will of my cousin, [*name*], late of —— aforesaid, devised to me for my life, with remainder to my children as tenants in common in fee; and my four eldest children, being of age, have released and conveyed unto the respective purchasers of the said hereditaments all their respective estates and interests in the said hereditaments. Now, I DECLARE, that no other child of mine and no issue of any such child, shall take any benefit under my will, (other than the benefit of any provision for his or her maintenance, education, or advancement), unless he or she shall, within six months from my decease, or from his or her attaining his or her majority, (whichever shall last happen), execute a sufficient release and conveyance to the said several purchasers, or their respective heirs, appointees, or assigns, of all his or her estate and interest in the said hereditaments, and shall allow all the purchase monies for the same hereditaments or any part thereof to be received by my trustees or trustee as part of my personal estate; And my will shall be construed and operate as if the child or children who or whose issue shall refuse or neglect to execute such release and conveyance as aforesaid had never existed or been referred to in my will.

TRUSTEE CLAUSES.

Trustees' receipt clause.

79 *a*. PROVIDED ALWAYS, AND I HEREBY DECLARE, that the receipts in writing of the said [*trustees*], or the survivors or survivor of them, or the heirs, executors, or administrators respectively of such survivor, or other the trustees or trustee for the time being of my will, for any sum or sums of money payable to them or him under or by virtue of any of the powers and authorities hereinbefore contained, or otherwise in the execution of the trusts of my will, shall be effectual discharges for the same respectively, or for so much thereof respectively as in such receipts shall be expressed or acknowledged to be received, and that the person or persons to whom

the same shall be given, his, her, or their heirs, executors, administrators, or assigns shall not afterwards be answerable or accountable for any loss or misapplication thereof.

Another form.

79 *b*. And I hereby declare, that every person who shall or may pay any trust-money to the trustees or trustee for the time being of this my will, upon their or his receipt in writing, shall be exonerated from all responsibility in respect of the application thereof.

Indemnity to purchasers and mortgagees.

79 *c*. And I hereby declare, that no person to whom my trustees or trustee for the time being shall sell or mortgage any hereditaments or property under my will, shall be bound to inquire or take notice whether the occasion for such sale or mortgage has arisen, or otherwise to ascertain or consider or see to the application of any purchase or mortgage monies, or the necessity or propriety of any sale or mortgage which shall be made by such trustees or trustee.

Power to appoint new trustees; (*adapted to ordinary circumstances; see the shorter form* (80 *e*));

80 *a*[1]. I declare, that if any person hereby named or hereafter being a trustee of my will be now dead (*a*), or should die or go to reside or be resident out of or be absent for a year from England and Wales, or suffer his estate and effects to become vested in assignees in bankruptcy or insolvency, or make any assignment for the benefit of creditors, or disclaim, neglect, refuse, or be incapable to perform, or desire to retire from, the office, it shall be lawful for the disclaiming or retiring trustee or trustees, being competent and willing to exercise this power, jointly with the continuing trustees or trustee, (if any), or, if no trustee disclaim or retire and be competent and willing to exercise this power, for the other trustees or trustee (being competent), or, in case of the death of an only trustee, for such trustee by his or her will (*b*), or in default thereof, and if there be no such trustee, for the acting executors or administrators of the last surviving or continuing trustee, [but not without the consent of the said [*party to consent*], if living and competent and not residing abroad], or, if there be no such person, for my acting executors or administrators, to appoint by writing, attested by one witness, a trustee in the room of

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(*a*) [See *Winter* v. *Rudge*, 15 Sim. 597.]

(*b*) [See *Cooke* v. *Crawford*, 13 Sim. 91, ante, p. 782.]

such person; And that it shall not be necessary to supply several vacancies at the same time; [Nevertheless, it is my desire, that, so far as may be consistent with convenience, there be always three trustees of my will; And that two trustees may be appointed in the room of one, so that there be never more than four trustees of my will;] And that every instrument purporting to be made in pursuance of the foregoing power, and not appearing on the face of it to be invalid, shall, though not so made, be valid for all purposes other than the exoneration of parties to the making thereof from responsibility; And that every trustee appointed under this power shall immediately have all the powers of a trustee, although the trust property be not then vested in him (*a*); And that the acting executors or administrators of an only trustee may exercise all the powers of such trustee [not hereby expressly given to his heirs (*b*).]

—indemnity to third persons;

—trustees may act before transfer of trust-property;

—executors of sole trustee may act;

80 *a*[2]. [And I DECLARE, that the trustees or trustee for the time being of my will may exercise any power or discretion hereby given to the trustees herein named] (*c*).

—trustees or trustee for the time being may exercise powers;

80 *a*[3]. I DECLARE, that the receipt in writing of my trustees or trustee for the time being for any trust-monies or trust-property shall discharge the person or persons paying or transferring the same from responsibility for the application thereof, or the propriety or regularity of the payment or transfer thereof, or of any transaction leading thereto (*d*).

—receipt clause;

(*a*) [This provision is of great importance, in consequence of the inconvenient doctrine acted upon in a recent case (*Warburton* v. *Sandys*, 14 Sim. 622; and see *Bennett* v. *Burgis*, 5 Hare, 295), that a mere appointment does not constitute the appointee complete trustee, and that he cannot act until the whole of the trust-property is vested in him jointly with the other trustees, if any. Where, as is sometimes necessary, a trustee of leaseholds, &c., is merely appointed for the purpose of appointing another, this rule causes much needless expense.]

Importance of declaration that the trustees may act before the trust property is vested in them.

(*b*) [These words will be omitted, if no power is given to the heirs of a sole trustee.]

(*c*) [If the powers of the will are conferred on "the trustees or trustee for the time being," (which is generally the most convenient form), it will, of course, be unnecessary to provide here that the trustees to be appointed under the power may exercise all the powers given to the trustees named in the will. But where the powers are given to the trustees by name, as it is sometimes convenient to do, the above declaration may be proper.]

Mode of referring to the trustees in the will.

(*d*) [The receipt clause is usually placed before the power to appoint trustees, but the present place seems to be more appropriate, and is one in which it is less likely to be overlooked.]

—indemnity to trustees.

80 *a* [4]. I DECLARE, that each trustee shall be answerable only for losses arising from his own default (*a*), and may retain and allow to his co-trustees all expenses incident to the performance of the trusts; [And that every trustee being a solicitor or attorney, or auctioneer or appraiser, may give, transact, and charge for any professional advice or business in relation to the trusts of my will in the same manner as if he were not a trustee.]

Variations of the foregoing form;

80 *b* [1]. I DECLARE that [every person who shall cease to reside in or within —— miles of ——, shall thereupon cease to be a trustee of my will, and that] [if it should be thought expedient [by my wife, or, after her decease,] by my trustees or trustee for the time being, to increase the number of my trustees (*b*), or] if any person hereby named or hereafter being a trustee of my will be now dead, or should die or go to reside out of or be absent for a year from England and Wales, or suffer his estate and effects to become vested in assignees in bankruptcy or insolvency, or make any assignment for the benefit of creditors, or disclaim, neglect, refuse, or be incapable to perform, or desire to retire from the office [or should cease to reside in or within —— miles of —— (*c*)],

—alternative clauses, giving the authority to appoint in various ways;

80 *b* [2]. —— it shall be lawful for the other trustees or trustee, being competent, or if there be no such trustee for the acting executors or administrators of the trustee who was last competent, or, if there be no such person, for my acting executors or administrators (*insert* (80 *b* [15]))—

80 *b* [3]. —— it shall be lawful for the surviving or continuing or other trustee or trustees for the time being of this my will,

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(*a*) [This clause adds nothing to the security of the trustees, but may give them, if they be not well acquainted with the strict rules of the Court of Chancery, a very exaggerated notion of their immunities. Vide ante, Vol. 9, p. 726. The provision for the payment of the trustees' expenses is also mere surplusage.]

(*b*) [If these words are inserted, the form (80 *b* [6]) should be used.]

Provision in case trustee of a farm, &c., removes from the neighbourhood.

(*c*) [Sometimes, when trustees are required to manage a trading or farming concern, or when the trusts are otherwise of such a nature as to require constant or frequent personal superintendence at a particular locality, provision is made for the appointment of a new trustee in the room of any trustee going to reside away from the neighbourhood; and this provision either assumes the form of a mere authority to make a change in the trusteeship, or it declares that the person so removing shall ipso facto cease to be a trustee. The clause in the text may be adapted to either case.]

by any note or writing under their, his, or her hands or hand, with the consent in writing of my said wife, if then living and unmarried, and, after her decease or marriage, of their, his, or her own proper authority—

80 b^4. —— it shall be lawful [for my said wife during her widowhood and competency, and afterwards] for the other trustees or trustee of the same class, [*or*, for the competent acting trustees or trustee of the same class, being in England], or, being none, for [the other trustees or trustee under my will, or, being none, for] the acting executors or administrators of the last trustee of the class aforesaid who shall have died in his office, or, being none, for my acting executors or administrators (*a*)— —several sets of trustees;

80 b^5. —— it shall be lawful for the other trustees or trustee, or, if there be no such trustee, for the person or persons who shall retire from or disclaim the office, (being capable and willing) (*b*), or, if there be no such person, for the acting executors or administrators of the person who shall then have last died in the office, or, if there be no such person, for my acting administrators for the time being—

80 b^6. —— it shall be lawful [for my said wife during her life and competency, and afterwards], in the case of retirement, for the retiring trustee, and, in any other case, for the other or continuing trustee or trustees, (being competent), or, if there be no such trustee, for the executor or administrator, or one of the executors or administrators of the trustee who shall have last died in the office, or, if there be no such person, for my acting executors or administrators, or, if there be no such person, for [*name*], his acting executors or administrators—

(*a*) [The foregoing general power (80 *a*) seems to be applicable where there are several classes of trustees appointed by the will; but, in order to preclude any doubt, it may be as well, in such case, to adopt the above more explicit form.]

(*b*) [Some persons who disclaim a trusteeship carry their caution to the length of refusing even to accept the office for the sole purpose of nominating their successors; but, where the will authorises trustees to retire, it is clear that a trustee may, within a reasonable time after the testator's death, accept the trusts so far as to nominate other trustees, without incurring any responsibility. Even where a trustee has accepted the office, and wishes to retire, he sometimes objects to name a successor; and, on the whole, though a disclaiming or retiring trustee may generally be expected to make a more impartial selection than a continuing trustee, the most advisable, because most convenient, course seems to be to give the power to the continuing trustees.]

80 *b*[7]. —— it shall be lawful [for the said [*tenant for life*], whether married or sole, or, if she be dead, incompetent, or abroad,] for [*name*] (*a*), of &c., or, if he be dead, incompetent, or abroad, for the retiring trustee, or, if no trustee retire, for the other trustees or trustee, (being competent), or, if there be no such trustee, for my acting executors or administrators, or, if there be no such executors or administrators (*b*), for the acting executors or administrators of the said [*name*]—

80 *b*[8]. —— it shall be lawful for my said wife, during her widowhood, and, after her decease or re-marriage, for my daughters or daughter for the time being, or such of them as shall be adult, and after the decease of such daughters respectively, or in case they should be under age or otherwise incapable of exercising this present power, then for the surviving or continuing trustee, or, if there be no such trustee, then for the retiring or renouncing trustee for the time being, or if there be no such last-mentioned trustee, then for the acting executors or administrators of the last-deceased trustee, or, if there be no such person, for my acting executors or administrators—

80 *b*[9]. —— it shall be lawful for the said [*husband*] and [*daughter*], or the survivor of them, with the consent in writing of the surviving or continuing trustee, if there be any such trustee, and if not, then of the proper and sole authority of the said [*husband*] and [*daughter*], or the survivor of them, and after the decease of such survivor, then for the surviving or continuing trustees or trustee, or, if there be no such trustee, for the renouncing or retiring trustee, or, if none, then for the acting executors or administrators of the last-surviving trustee, or, if none, for my acting executors or administrators—

80 *b*[10]. —— it shall be lawful for the person or persons who for the time being shall, by virtue of any of the limitations of this my will, be in the actual possession of or beneficially entitled to the receipt of the rents and profits of the hereditaments hereinbefore devised, or such of the same persons respectively as shall be of full age and otherwise competent to exercise this present power, but if such person or all

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(*a*) [Some person, whether an object of the testator's bounty or not, in whose judgment he has confidence.]

(*b*) [This provision may obviate the necessity of taking out an administration merely for the purpose of exercising the power.]

such persons (if more than one) should be under age, or otherwise incompetent to exercise the said power, then for the surviving or continuing trustees or trustee for the time being, or, if there should be no such trustee, for the acting executors or administrators of the last surviving or continuing trustee for the time being, or, if there be no such person, then for the renouncing or retiring trustees or trustee for the time being, or, if there be no such person, for my acting executors or administrators—

80 *b*[11]. —— it shall be lawful for the person or persons for the time being entitled directly under my will, and not by assignment, to the receipt of the income from the said trust estates [trust funds], or of any aliquot part thereof, being of full age [discovert], and competent, or, if there be no such person, or if such person should have absolutely sold or parted with his or her interest, for the other trustees or trustee, or any executor or administrator of the last surviving trustee, or, if there be no such person, for my acting executor or administrator—

80 *b*[12]. —— it shall be lawful for the said [*tenant for life*], or any executor or administrator of the said [*tenant for life*], or, if the said [*tenant for life*] be incompetent, for my acting executors or administrators—

80 *b*[13]. —— it shall be lawful for the said [*devisees in common*], or the survivors or survivor of them, or, after the death of such survivor, in the case of retirement, for my trustees or trustee, whether retiring or not, or, in any other case, for the other trustees or trustee (being competent), or, if none, for any executor or administrator of the last-deceased trustee, or, if none, for my acting executors or administrators—

80 *b*[14]. —— it shall be lawful for the said [*devisees in common*], or the survivors or survivor of them, or such of them respectively as shall be competent, or any executor or administrator of such survivor, or, if there be no such person, for my acting executors or administrators—

80 *b*[15]. —— to appoint by writing, attested by one witness, [an additional trustee [or additional trustees,] or] a trustee in the room of such person; And that it shall not be necessary to supply several vacancies at the same time; [Nevertheless, it is my desire, that, so far as may be consistent with convenience, there be always three trustees of my will;] [And that two trustees may be appointed in the room of one, so that there be never more than four trustees under

—to appoint additional trustees;

—indemnity to third persons;

my will;] And that every instrument purporting to be made in pursuance of the foregoing power and not appearing on the face of it to be invalid shall, though not so made, be valid for all purposes other than the exoneration of parties to the making thereof from personal responsibility. And that every trustee appointed under this power shall immediately have all the powers of a trustee, although the trust property be not then vested in him; And that the acting executors or administrators of an only trustee may exercise all the powers of such trustee not hereby expressly given to his heirs (*a*).

—provision for increasing or diminishing the number of trustees, where a large number of trustees is appointed.

80 *b*[16]. And I declare, that it shall not be necessary to supply several vacancies at the same time; And that two trustees may be appointed in the room of one, but so as not to increase the number of trustees above eight; And that any trustee who shall, by writing signed by himself and by five other competent and continuing trustees in England for the time being, declare that he retires from the office, shall

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As to the provision for the appointment of new trustees.

(*a*) [A complete provision for the appointment of new trustees should define with accuracy every event within the limits of moderate probability in which the power may be required; indicate without ambiguity the person or persons by whom the power is to be exercised; provide, if necessary, for the due vesting of the trust property in the trustees for the time being; and provide for the easy satisfaction of purchasers and others dealing with the ostensible trustees, as to their due appointment and authority. The only events for which, in ordinary cases, provision seems to be required, are these:—1. Death of any or all of the persons appointed to the office, either in the testator's lifetime or after his death, and, in the latter case, either having accepted the office or not; 2. Disclaimer; 3. Incapacity; 4. Residence out of the jurisdiction of the Court of Chancery; 5. Bankruptcy or insolvency; 6. Neglect of duty; 7. Retirement. Of these several events or conditions precedent to the exercise of the power, the third, fourth, fifth, and sixth may not be susceptible of easy and inexpensive proof to a cautious purchaser or mortgagee, or refractory tenant; and, to meet this difficulty, it should be provided that the instrument of appointment shall be sufficient evidence to purchasers and others of the matters recited in it.]

[The indication of the persons who are to be entrusted in each event with the power of appointment is a matter of some nicety, requiring not only an exercise of judgment in selecting from among the several objects of confidence who may be suggested, but also a provision for the refusal or neglect of the primary donee of the power to exercise it. The forms in the text, with the variations appended to them, afford examples of different solutions of this problem, from which the practitioner may select such as best accords with the wishes of the testator, or his own notions of expediency.]

thereupon cease to be a trustee; It being my desire that the number of trustees shall never be less than five or exceed eight.

Clause for shifting the trust estates.

80 *c*. And, so far as the rules of law will permit, and subject to any previous disposition of any part or parts of the trust premises, upon every exercise of the foregoing power before the expiration of twenty-one years from the death of the survivor of the several persons mentioned by name in my will, I devise [and bequeath] such of the said several trust estates as ought to be vested in my trustees or trustee for the time being, To such uses, and in such manner, and I direct, that, as to such trust estates, my will shall so take effect, as if such trustee or trustees had been in existence at my death, and his or their name or names had been inserted in my will in the room of and wherever the names of the said [*trustees*] occur (*a*).

Power to appoint trustees;

80 *d*. I declare, that if my said trustees or either of them, or any trustees or trustee to be appointed under this clause, shall die, or be unwilling or incompetent to accept or execute the trusts of my will, it shall be lawful for my wife, whether covert or sole, and, after her death, for the competent accepting trustees or trustee for the time being, if any, whether retiring from the office of trustee or not, or, if none, for the executors or administrators, or any or either of the executors or administrators of the last deceased trustee, to substitute, by any writing under their or his hands or hand, any person or persons, in whom alone, or (as the case may be) jointly with any surviving or continuing trustees or trustee, my trust estate shall be vested; And I exempt every trustee of my will from liability for losses occurring without his own wilful default, and authorise him to retain and allow to his co-trustee or co-trustees any expenses incidental to the trusteeship; And I declare, that the powers and declarations hereby

—indemnity of trustees.

(*a*) [This provision will, of course, only affect such property as passed by the will and has not been disposed of so as to be free from the trusts. And, even in respect of such property, it will be prudent in most cases to execute the usual assurances upon every change of trustees. In respect of property which the testator *appoints* under a power, the rule against perpetuities may prevent the operation of the clause. But where economy is desired, or a conveyance of the legal estate cannot be readily procured, the clause may be useful, and it can never do any harm.]

vested in the trustees herein named, shall be exercisable by the trustees or trustee for the time being of my will (*a*).

Power to appoint new trustees; with variation to meet the case where only one trustee is originally appointed; (*Short form*).

80 *e*. I DECLARE, that [it shall be lawful for the said [*trustee*], his executors or administrators, or any trustee or trustees for the time being, to appoint an additional trustee or additional trustees of my will, so that there be not more than three trustees at one time; AND that] any vacancy or vacancies occurring in any trusteeship under my will, by death (in my lifetime or afterwards), disclaimer, resignation, absence for a year from England and Wales, residence abroad, refusal to act, or incapacity, may be supplied by the trustee or trustees for the time being, including any retiring or disclaiming trustee or trustees, if willing to act, or, if there be no trustee willing to act, by the acting executors or administrators of the person who shall have last died in the trust, or, if there be no such person, by my acting executors or administrators; Every such appointment to be made by any attested writing, or (in case of a sole appointor) by any attested writing or will. (*Receipt and indemnity clauses*, (80 *a*[3]), (80 *a*[4])).

Another form.

80 *f*. PROVIDED ALWAYS, AND I HEREBY FURTHER DECLARE, that in case the said [*trustees*], or any of them, should die in my lifetime, or at my decease should renounce or be incapable of acting in the trusts hereof, or in case all or any of the trustees for the time being of my will should, during the continuance of any of the aforesaid trusts, cease to reside in the united kingdom of Great Britain and Ireland, or should die, or desire to be discharged from the aforesaid trusts, or refuse or become incapable to act therein, or be adjudged bankrupt, or take the benefit of any act for the relief of insolvent debtors (*b*), then, and so often as the same shall happen, it

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(*a*) [The above form is taken from Mr. Hayes's precedent of a will, Introd. to Conv., Vol. 2, p. 215.]

Remarks on the power of appointing new trustees.

(*b*) This may seem to be rather an operose provision against vacancies occurring in the trusteeship, but a clause less elaborately comprehensive would not take in the whole range of events by which vacancies might arise in the lifetime of the testator or afterwards. It has not been usual, indeed, in framing such powers, to provide against vacancies happening in the testator's lifetime, under an impression, probably, that the testator might himself supply, by a new nomination, any vacancy occurring before his death; but it is to be remembered, that the event may happen while the testator is incapable of altering his will, so that the power clearly ought to embrace this class of events. The extension of the

shall be lawful for the surviving or continuing trustees or trustee for the time being, or, if there should be no such trustee, then for the executors or administrators of the last surviving or last acting trustee for the time being, by any deed or deeds to be sealed and delivered in the presence of and attested by one or more witness or witnesses, or, if the person exercising this present power should be an only surviving or continuing trustee, or any other single individual by his or her last will and testament or any testamentary writing (*a*), to nominate and appoint some other fit person or persons to be a trustee or trustees for the purposes aforesaid, or any of them, in the place or stead of the trustee or trustees dying in my lifetime, renouncing, ceasing to reside in the united kingdom, or dying, or desiring to be discharged, or refusing or becoming incapable to act, or becoming bankrupt or insolvent as aforesaid (*b*); And that every such new trustee shall and may act and assist in the management and execution of those trusts to which he or she shall be so appointed, as fully and effectually in all respects, and with the like powers and indemnifications, as he or she might have done if originally in and by this my will appointed a trustee for the purposes aforesaid, or as if his or her name had been inserted in this my

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power to bankruptcy and insolvency is also an innovation; but it seems proper that an event which must weaken the confidence of the persons beneficially interested, and may actually endanger the property, should be made a ground of removal. The expediency of the proposed extension of the power of course will considerably depend upon the degree to which, by the nature of the trusts, the property is placed under the control of the trustees, not at all upon the rank or character of the *existing* trustees, they being a fluctuating body.

Some practitioners extend the provision in question to proceedings in a foreign country analogous to bankruptcy in England, by adding such words as the following:

"or should take the benefit of any foreign law for the relief of debtors, by cessio bonorum, sequestration, or any other means."

(*a*) This would sometimes be useful, as the trustee exercising the power by will might not only nominate the new trustees, but vest the trust estate in them; and there is this obvious convenience in the proceeding, that the same event which creates the vacancy, namely, the trustee's death, supplies the vacant trusteeship with a new functionary.

(*b*) Observe that the usual but superfluous direction respecting the conveyance and transfer is omitted.

will in the place of the trustee in whose stead he or she shall be substituted.

Declaration as to transfer of trust estates.

80 *g*. And that, when and so often as any new trustee or trustees shall be nominated and appointed as aforesaid, all the trust estates, lands, tenements, hereditaments, monies, and premises which shall then be vested in the trustee or trustees so dying, desiring to be discharged, or refusing, declining, or ceasing to reside in the kingdom, or becoming bankrupt or insolvent, or incapable to act as aforesaid, either solely or jointly with the other trustee or trustees, shall thereupon with all convenient speed, at the cost of my trust-estate, or of that part thereof to which such nomination and appointment shall relate, be conveyed, assigned, and transferred in such sort and manner, and so that the said premises shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust-estates, monies and premises respectively, and such new or other trustee or trustees; or, if there should be no continuing trustee or trustees of the same trust-premises, then in such new trustee or trustees only, and his, her, or their heirs, executors, administrators, and assigns, To the same uses and upon the same trusts as are hereinbefore declared concerning the same trust-estate, monies, and premises respectively, the trustee or trustees whereof shall so die or be desirous of being discharged, or refuse, decline, or become incapable to act as aforesaid, or such of them as shall or may be then subsisting and capable of taking effect; And that all and every such new trustee and trustees shall and may, as well before as after the execution of such conveyance and assignment as aforesaid, act and assist in the management, carrying on, and execution of the trusts to which he, she, or they shall be so appointed, in conjunction with the other then surviving or continuing trustee or trustees of the same trust-estates, monies, and premises, if there shall be any such trustee or trustees, if not, then by himself, herself, or themselves, as fully and effectually, and with the same powers and authorities in all respects, as if he, she, or they had been by this my will nominated a trustee or trustees for the purposes for which such new trustee or trustees respectively shall be appointed a trustee or trustees, anything hereinbefore contained to the contrary thereof notwithstanding (*a*).

(*a*) [This clause, with the exception of the words declaring that the trustees may act before the trust estates are vested in them, is perfectly useless.]

80 *h* [1]. PROVIDED ALWAYS, AND I HEREBY DECLARE, that in case the said [*trustees*], or any of them, or any trustees or trustee for the time being nominated and appointed in their or his place or stead, should die (either in my lifetime or after my decease), or shall on my decease, or at any time or times afterwards, renounce or become unwilling or unable to act in the aforesaid trusts [not including therein the trusts concerning the shares of my daughters in the trust-premises,] before the said trusts shall be fully executed and performed, then and so often as the same shall happen, it shall be lawful for my children the said [*five children*], and any child or children of mine hereafter to be born, or such of the same children respectively as for the time being shall be living and of full age and otherwise competent to exercise this present power, and if there be no such person willing to act, then for the surviving or continuing trustees or trustee for the time being, or if there be no such trustee willing to act, then for the renouncing or retiring trustees or trustee, or if there be no such last-mentioned trustee, or they or he shall decline to act in the premises, then for the acting executors or administrators of the last deceased trustee, or, if there be no such person willing to act, for my acting executor or administrator, to appoint any fit person or persons to supply the place or places of the trustee or trustees respectively so dying, or becoming unwilling or unable to act as aforesaid. *(Add, if thought necessary, declaration as to transfer of trust property.)*

Appointment of new trustees where there are separate trustees of a specific fund;

80 *h* [2]. PROVIDED ALSO, AND I FURTHER DECLARE, that in case at any time or times after the failure or determination of the power of changing trustees hereinbefore contained, any trustees or trustee for the time being of the shares of my said daughters respectively in the said trust-premises should die, or should become unable or unwilling to act in the trusts hereby declared concerning the same shares respectively, before such trusts shall be fully executed and performed, then and in every such case, it shall be lawful for each daughter of mine, in respect of her own share in the said trust-monies, stocks, funds, and securities, and if such daughter should have departed this life, then for the husband of such daughter (if any) who may for the time being be entitled to the income of any part of the said trust-premises, under any testamentary appointment to be made in his favour as aforesaid, and if there should be no husband so entitled (*a*), or if any such daughter or husband (as

—power to appoint new trustees in respect of daughters' shares;

(*a*) Observe the difference between this clause, which vests the power

the case may be) should be unable, by reason of minority or from any other cause, to exercise this present power, then, and in every such case, it shall be lawful for the surviving or continuing trustees or trustee for the time being of the trust-funds and premises in respect of which such vacancy shall have occurred as aforesaid, and if there should be no such trustee, then for the retiring trustees or trustee, and if there should be no such last-mentioned trustee, or they, he, or she shall decline to act in the premises, then for the acting executors or administrators of the last deceased trustee, or, if there be no such person, for the trustees or trustee of my general estate, to nominate any fit person or persons, not being beneficially interested, or the husband of any person beneficially interested in the premises in respect of which such nomination shall be made, to supply the place or places of the trustees or trustee respectively so dying or becoming unwilling or unable to act as aforesaid.

—exoneration of persons paying trust-monies to trustees of daughters' shares;

80 *h* [3]. PROVIDED ALSO, AND I FURTHER DECLARE, that all and every person and persons paying any monies or transferring any stocks, funds, or securities to the trustees or trustee for the time being of the respective shares of my daughters in the said residuary personal estate, stocks, funds, and securities, shall be exempt from all responsibility in respect of the application thereof.

—special power of new appointment in regard to rent-charge;

80 *h* [4]. PROVIDED ALSO, AND I FURTHER DECLARE, that the power lastly hereinbefore contained is not intended to apply to the trusteeship hereby constituted in respect of the said yearly rent-charge of £—— hereinbefore devised; But that when and so often as a vacancy shall occur therein by any of the means mentioned in the power lastly hereinbefore contained, a new trustee or trustees shall be forthwith appointed by the said [*sister*], and the said rent-charge shall thereupon, at the costs and expense of the said [*sister*], be granted and assured to such trustee or trustees accordingly.

—recommendation of friends as trustees not to be obligatory.

80 *h* [5]. AND I recommend that my friends, [*names*], be nominated to fill the first and second vacancies so as aforesaid occurring in the said trusteeship; But I expressly declare that such recommendation shall not be obligatory on

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of new appointment in each daughter respectively in regard to her own share, and the general clause which vests the power in regard to entire trust property in the children for the time being. The power relating to the several shares, it will be observed, does not take effect until the general power has determined.

the person or persons exercising this present power (*a*) as aforesaid.

Power of changing trustees, and imperative direction to supply vacancies in trusteeship.

80 *i*. PROVIDED ALWAYS, AND I HEREBY DECLARE, that when and so often as any of my said trustees hereinbefore named, or other the trustees to be appointed as hereinafter mentioned, shall, by the decease of any of them in my lifetime or after my decease, or by any of them renouncing or declining or becoming incapable to act, or otherwise, be reduced below the number of five acting trustees before the accomplishment or performance of the said several trusts and purposes hereinbefore declared, it shall be lawful for the survivors or survivor or others or other of the said trustees for the time being, and they and he are and is in every such case hereby directed and required forthwith to appoint one or more other fit person or persons to be a new trustee or trustees in the room of the trustee or trustees so dying or renouncing or declining to act, or otherwise ceasing to be an acting trustee of this my will, so that the full number of five acting trustees shall from time to time be kept up; And that when and so often as any new trustee or trustees shall be so appointed, all the aforesaid trust-estates, funds, securities, and premises, real and personal, which may be then vested in the trustees or trustee for the time being shall be thereupon conveyed and assigned at the costs of my trust-estate, so and in such manner as that the same may be or become vested in such new trustee or trustees jointly with the then surviving or continuing trustee or trustees, or in such new trustee or trustees solely, as the case may require, upon the trusts, for the purposes, and with, under, and subject to the powers, provisoes, and declarations hereinbefore expressed concerning the same; And that all and every such new trustees or trustee shall and may in all things, as well before as after the execution of such conveyance and assignment as aforesaid, act and assist in the

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Trustees directed to nominate certain persons on first vacancies.

(*a*) It should be distinctly shewn whether a recommendation of this nature is intended to be obligatory; if so, the clause in the text may be thus varied,—

"AND I DIRECT that my friends, [*names*], be nominated to fill the first and second vacancies so as aforesaid occurring in the said trusteeship, and that no other person shall be appointed thereto, unless they respectively shall decline such nomination."

management, carrying on, and execution of the several trusts, or any of them, whereto they or he shall be so appointed, as fully and effectually and with all the same powers and indemnities, to all intents and purposes, as if he or they had been originally appointed a trustee or trustees thereof by this my will.

Indemnities to trustees;

80 *k*[1]. PROVIDED ALSO, AND I FURTHER DECLARE, that the trustees for the time being of this my will shall not be answerable or accountable the one for the others or other of them, or for the acts, deeds, defaults, receipts, payments, or disbursements of the others or other of them; or be charged or chargeable with or accountable for any further or other sum or sums of money or other trust-property and effects than what shall actually come to the hands of and be received by them respectively, notwithstanding they or any or either of them shall give or sign, or join or concur in giving or signing any receipt or receipts for the sake of conformity; And that they or any or either of them shall not be answerable or accountable for the insufficiency, defect, or failure of any banker, broker, auctioneer, agent, or other person in whose hands any part or parts of the aforesaid trust-monies or other property shall or may at any time or times hereafter happen to be by them or any or either of them placed or lodged for safe custody, or who may be allowed to receive the same in the course of the execution of the trusts of these presents; [or for any defect or insufficiency in the title or evidence of title to any estates or hereditaments which the said trustees or trustee shall or may purchase under or by virtue of the trusts, powers, and authorities hereinbefore contained, in case such title shall have been approved by counsel on their or his behalf]; or for any loss or damage which shall or may happen or arise of or to all or any of the aforesaid trust-estates, monies, effects, and premises, or the proceeds or produce thereof or of any part thereof, provided the same shall happen without any wilful neglect or default on the part of such trustees respectively (*a*).

Inefficacy of ordinary indemnity clauses to exonerate trustees.

(*a*) A full dissertation on the responsibility of trustees, and on the inefficacy of the ordinary indemnity clauses to diminish and restrict it, will be found, ante, Vol. 9, p. 726. If it be really intended by the author of the trusts that one trustee shall not be answerable for another, he should afford a more special and marked indication of such intention than is disclosed by the clause in the text, as that clause is judicially interpreted. For this purpose, the clause (80*k*[2]) should be added.

80 *k*[2]. And especially I hereby declare it to be my will and meaning, that in case and so often as any trustee for the time being of this my will shall pay over to or cause or permit any co-trustee to receive any sum or sums of money, in order and to the intent that the same may be applied by such co-trustee for the purposes of this my will, it shall not be incumbent on the trustee making such payment, or causing or permitting such receipt, to see or inquire into the application of the said monies, or to ascertain the truth or accuracy of any representation made by his co-trustee concerning the same, nor shall the trustee who shall make default in any of the particulars aforesaid be responsible for any loss which shall arise to the said trust-estate by reason thereof, any rule of equity to the contrary notwithstanding. Nevertheless, I declare, that this exemption from legal responsibility shall not abridge or affect the right of any trustee to inquire into the transactions of his co-trustee or trustees, and I feel convinced that it will not abate the friendly circumspection of my trustees. —special indemnity to trustees.

80 *l*[1]. And I declare, that it shall be lawful for every trustee for the time being of this my will from time to time and at all times to retain to and reimburse himself respectively, and to allow to his co-trustees or co-trustee by and out of the said trust-estate, monies, and premises, or the income or proceeds thereof, all such loss, costs, charges, and expenses as they or any or either of them shall or may pay, sustain, expend, or be put unto by reason of the trusts hereby in them respectively reposed, or in the management or execution thereof or otherwise relative thereto. Trustees' expenses;

80 *l*[2]. And I especially declare, that the said trustees for the time being shall be allowed their full costs as between attorney and client, and that every trustee who may happen to be of the profession of an attorney or solicitor, or auctioneer or appraiser, shall be entitled to make the usual professional charges for advice given and business transacted and done for and on the behalf of my trust-estate, any rule of equity to the contrary notwithstanding. —trustees may make professional charges.

80 *m*. I request my trustees or trustee to employ and take the professional advice and assistance of my friend, [*name*], of &c., solicitor, in all matters relating to the trusts of my will wherein they or he may require professional assistance. Advice.

Legacy to newly appointed trustees.

80 *n*. And I hereby give and bequeath to each and every of the trustees to be appointed under the power hereinbefore contained, the sum of £——, in consideration of the trouble such trustee or trustees respectively will have in the execution of the trusts of this my will, such legacy or legacies to be paid out of so much of my residuary personal estate as shall at the time of such appointment or appointments respectively remain subject to any of the trusts of this my will.

Authority to executors and trustees to deduct commission on sums received.

80 *o*. I authorise and empower my said executors and trustees, and all and every other the trustees and trustee for the time being of my said will, to deduct and retain a commission or salary, at the rate of 2*l*. 10*s*. per centum on the gross amount of the monies received by them respectively in the execution of the trusts of my said will; And in case any question shall arise in regard to the proportions in which the respective trustees should be entitled to such commission, then I direct that the sum to be claimed by each trustee shall be proportional to and calculated on his own separate receipts.

Authority to trustees to purchase trust-property.

80 *p*. I authorise any trustee or trustees of my will to purchase at any auction, or from his or their co-trustees or co-trustee by private contract, any part or parts of my said trust-estates.

Trustees to be bound by the voice of the majority.

80 *q*. And I direct and declare, that in case a difference of opinion should exist among my trustees for the time being in regard to any of the trust-affairs, or any act, matter, or thing proposed to be done in relation thereto, the opinion and determination of the majority of the same trustees shall or may be conclusive, it being my intention that the acts and proceedings of the major part in number of the said trustees shall for all the purposes of this my will be and be deemed to be and be taken as the acts and proceedings of the whole or entire body of the same trustees, any rule of law or equity to the contrary notwithstanding (*a*).

Proviso, that questions arising under the will shall be settled by the trustees. Per-

80 *r*. Lastly, if any question should arise concerning the construction of my will, or any clause, matter, or thing therein contained, or concerning the amount of any deductions or allowances to be made in respect of any alleged advancement or

(*a*) This may be useful where the trustees are numerous.

loan by me to any of my children, I AUTHORISE AND EMPOWER my trustees or trustee for the time being, (other than my said son, [*name*]), acting either on their or his own judgment, or under professional advice, and upon such evidence as they or he shall think fit, finally to determine such question by writing under their or his hands or hand. AND every person who shall commence, take, institute, or carry on any suit or proceedings whatsoever in opposition to or for the purpose of disputing any such determination, shall thereupon forfeit all and every benefit under my will. AND the legacy or legacies, share or shares, or interest which shall be so forfeited shall be held UPON THE TRUSTS herein declared concerning the residue of my real and personal estate, as if such person or persons had died in my lifetime.

sons disputing such determination to forfeit all benefit under the will.

80*s*. PROVIDED ALSO, AND I HEREBY LASTLY DIRECT AND DECLARE, that the trustees or trustee for the time being of my will shall have full power and authority to decide upon, adjudge, and determine any question, doubt, or dispute which shall arise among my children or more remote issue, or any persons claiming through or under such children or issue, respectively, touching and concerning the true and proper construction and effect of this my will or of any clause or expression therein contained, or touching and concerning the rights and interests of my children or more remote issue respectively, under or by virtue of the same, provided that the decision of such trustees or trustee shall be in accordance with and shall be supported by the opinion in writing of some one of Her Majesty's counsel practising in the Court of Chancery, or of some one conveyancing counsel of not less than seven years' standing at the bar, to be nominated by my said trustees or trustee. AND I DECLARE, that in case any of my children or more remote issue, or any of such other person or persons as aforesaid, should refuse to abide by the award and decision of my said trustees, supported as aforesaid, and should file any bill in equity or institute any other proceeding or proceedings whatsoever either at law or in equity for the purpose of obtaining the judgment or determination of any court or courts of law or equity upon or concerning such doubt, question, or dispute as aforesaid, then, and in every such case, I absolutely REVOKE and make void every gift, bequest, and trust contained in this my will to or in favour of the person or persons who shall so act, any rule of law or

Power to the trustees to determine questions concerning the construction of the will.

equity in anywise notwithstanding; And I give and bequeath the share, property, and interest comprised in every such revoked gift, bequest, and trust to such person or persons, and for such purpose or purposes as the same would have gone and been applicable to under this my will, if the object or objects of such gift, bequest, or trust had died in my lifetime (*a*).

Appointment of executors;

80 *t*. Lastly, I nominate and appoint [*executors*] to be executors of my will; And I give and bequeath to each of them the sum of £—— in consideration of the trouble which he will be put to in such office; And I hereby authorise and empower my acting executors or executor for the time being, and, if there be no such executor, my trustees or trustee for the time being, in their or his absolute discretion, to allow, pay, compromise, compound, enforce, waive, accept, or give real or personal security for, or give time without taking any security for, or refer to arbitration, any debts or demands whatsoever which may be owing from or to or be made upon or against or in behalf of my estate, whether the same be legally enforceable or not, and upon such evidence as they or he shall think sufficient (*b*).

—power to compound debts, &c.

Remark on trustees' power of deciding on construction of will.

(*a*) What is the precise operation of a clause of this nature, under certain circumstances, it may be rather difficult to define; there is no doubt, however, of its having a pacific tendency, as few persons would be so imprudent as to incur the risk (for at least it must be admitted that there would be *risk*) of forfeiture, by refusing to bow to the decisions of the testator's tribunal of interpretation.

(*b*) [The above power would properly be inserted among the general directions for converting the residuary estate. But if the will contains no special directions with respect to the residuary personal estate, the clause may be conveniently placed at the end of the will.]

PRECEDENTS OF WILLS.

1. [WILL *of a* FARMER, *directing his* FARMING BUSINESS *to be* CARRIED ON *until his youngest Child attains Twenty-one or marries; the* PROFITS *and* INCOME *in the meantime for the* MAINTENANCE *of his* WIFE *and* CHILDREN; LEGACIES *to* CHILDREN *at Twenty-one or marriage with consent; When the* BUSINESS *is discontinued,* LIFE ANNUITY *to* WIDOW *and* RESIDUE *to* CHILDREN. *Full discretionary Powers; Discretionary Power to* CONVERT REAL ESTATE (*a*). 1. WILL OF A FARMER.

THIS IS THE LAST AND ONLY WILL OF ME, [*testator*], of &c. I APPOINT my wife, [*name*], during her widowhood, and [*names*], and also my son [*name*], when he becomes of age, executors and trustees of my will. I APPOINT my said wife during her widowhood, and after her decease or marriage my trustees or trustee for the time being (other than my said son), guardian and guardians of my children. I GIVE to my said wife the sum of £——, to be paid to her immediately after my decease, for present use and for mourning for herself and children. I GIVE the sum of £—— to each child of mine who shall survive me and attain the age of twenty-one years or marry with the consent of his or her guardian or guardians. IF any of my children should die before me, I GIVE the sum of £—— unto or equally between or among such child or children of each child of mine so dying before me as shall survive me and attain the age of twenty-one years or

Appointment of executors, trustees, and guardians.

Immediate legacy to wife.

Legacies to children at twenty-one or marriage with consent;

—substitution of children of deceased children;

(*a*) [The above Precedent embodies a scheme of testamentary disposition, which may be recommended for ordinary use in cases where children are to be provided for without entailing the real estate. The provisions for the testator's wife, and those relating to the real estate, may be omitted, if not required; and the directions for carrying on the farming business may easily be adapted to any other business. (See forms of trusts for carrying on a business (49 *a*) to (49 *f*)).]

1. WILL OF A FARMER.

marry with the consent of my said wife or, after her decease or marriage, of my trustees or trustee. I DIRECT the said legacies to my children or their issue to be respectively paid as soon as a legal discharge for the same can be obtained, unless my trustees or trustee desire to employ the same in my farming business; and, if the payment thereof be delayed beyond the time of vesting, interest at four per cent. from that time to be paid in the meantime quarterly. I EMPOWER my trustees or trustee, if they, he, or she think fit, but not otherwise, and at such time or times as they, he, or she may think fit, to sell my freehold and customary estates, and to hold the proceeds thereof on the trusts hereinafter declared of my residuary personal property. AND, subject to such power of sale, I DECLARE that my freehold and customary estates shall be held UPON TRUST for the respective persons entitled under my will to my residuary personal estate, and, as nearly as the tenure thereof will allow, for the like estates and interests, subject to the like powers, and in like manner in all respects. AND I EMPOWER my trustees or trustee to let any unsold freehold, customary, or leasehold property, (subject as to customary property to any customary restrictions), at rack-rent, subject to such covenants as they, he, or she may think fit, for any term not exceeding twenty-one years from the time of letting, or for mining, building, repairing, or improving purposes, for any period and on any terms; AND to drain, improve, repair, cut and sell timber on, insure from fire, manage and receive the rents of any unsold freehold, customary, or leasehold property; AND to raise any money for payment of my debts and legacies by mortgaging any part of my real estate, and giving to any mortgagee or mortgagees such powers of sale and other powers as my trustees or trustee shall think reasonable. AND I DECLARE, that the income actually produced by my real and leasehold estates shall be applicable as income under my will; But fines and premiums for building or mining leases shall be dealt with as capital. AND I AUTHORISE AND REQUEST my said trustees or trustee, while any son of mine is under age, or any daughter of mine is under age and unmarried, or for such shorter period as they, he, or she shall think fit, to carry on my farming business, and for that purpose to retain unsold all or such parts as they, he, or she shall think fit of my household furniture, plate, household linen, china, books, and other household effects, (including my fowling-pieces, and other articles used by me for personal recreation), carriages, horses, saddles, har-

--authority to use legacies in business;

—interest on legacies, if payment delayed.

Discretionary power to sell real estate;

—subject to power, realty to be held on same trusts as personalty.

Authority to let, improve, and manage real estate.

Power to mortgage for payment of debts and legacies.

Actual income to be applicable as income.

Authority to carry on farming business and retain farming stock, &c.;

1. WILL OF A FARMER.

ness, and other accoutrements, and my dairy and brewing utensils, implements of husbandry, crops, and live and dead stock; WITH full discretionary powers as to insurance, alteration, disposition and increase or diminution of capital or stock, and purchase of stock, employment of bailiffs, servants, and labourers, and their salaries, powers, and authorities, and the extent of personal superintendence to be exercised by my trustees or trustee; And, at the discretion of my trustees or trustee, to accept a fresh lease or fresh leases of any leasehold farm or farms I may occupy at my decease, or to hire on lease any other farm or farms, on such terms and for such time or times as they, he, or she may think expedient; And to take possession of and use in such business any unsold freehold or customary hereditaments; And generally to act in the management of such farming business and to use my real and personal property therein as if they, he, or she were absolute owners or owner thereof. AND I DIRECT, that the dwelling-house I shall occupy at my decease, or such other house as my trustees or trustee shall from time to time think fit, together with my household furniture and household effects, or a sufficient part thereof, shall be kept up at the expense of my residuary estate for the residence of my wife during her widowhood, and of my unmarried children, so long as any one of them is under age, [*or*, so long as the said business is continued]; AND I DIRECT, that, while the said business is continued, all or such part as my trustees or trustee shall think fit of the profits thereof, and my consumable household stores, and the income from my other property, shall be applied for the maintenance of my wife during her widowhood, and the maintenance and education of my children and the issue of any deceased children, in such proportions as my trustees or trustee shall think fit; With authority for my trustees or trustee to allow my wife to receive such profits and income or any part thereof during her widowhood for that purpose, without seeing to the application thereof; AND I DIRECT, that the unapplied profits (if any) of the said business shall be added to the capital of my residuary estate. SUBJECT to the foregoing directions and powers, I DIRECT, that my leasehold and personal estate shall be sold, got in, and converted into money; And, after payment of all expenses and my debts and legacies and the legacy duty on all legacies given by my will or any codicil, I DIRECT the clear surplus of the proceeds of my personal estate, and of such real estate as shall be sold, to be invested by my trustees or trustee in

—discretionary powers;

—power to take new leases of farms.

Residence and furniture for wife and infant and unmarried children.

Power to apply all or part of profits for maintenance.

Surplus profits and income to accumulate.

Direction to get in and invest residue of personalty.

1. WILL OF A FARMER.

their, his, or her names or name in the funds or on security of real property or railway debentures; the unapplied income thereof to be accumulated and added to the capital until the same is distributed, which distribution is not to take place until the discontinuance of my farming business. AND IF the said business should be discontinued during my wife's widowhood, I DIRECT my trustees or trustee to set apart so much of my residuary real and personal property, or the investments thereof producing permanent income, as shall be sufficient to produce the clear yearly sum of £——, and I give the income from such fund to my wife during her widowhood; And, in case she should marry again, I DIRECT that thereupon the fund so set apart shall be reduced so as to produce the clear yearly sum of £—— only, in which event, I GIVE the yearly income of such reduced fund to my wife during the remainder of her life. AND if my wife should marry before the said business is discontinued, I DIRECT the said yearly sum of £—— to be paid to her from the time of her marriage out of the income of my residuary estate until a fund is appropriated for the same. PROVIDED, that if either of the said appropriated funds should afterwards yield less than the before-stated income, the deficiency shall be made up out of the capital; And that such yearly sums given to my wife shall be made good up to the time of her marriage or death respectively by apportionment. AND, subject to the foregoing provision for my wife (which I DECLARE to be in lieu of all her dower and free-bench), and as to the residue of my personal estate and effects (including the capital of the said appropriated funds after the determination of my wife's interest therein respectively), I GIVE the same [UNTO such child or children or other issue of mine, for such interests, and in such shares and manner, as my wife, whether married or sole, shall by will appoint, so that every appointed interest shall vest before the end of twenty-one years from the decease of the survivor of my wife and children; And subject to any such appointment] UNTO such child or children of mine living at my decease, and such child or children of any child or children of mine dead in my lifetime as shall survive me and attain the age of twenty-one years or marry with such consent as aforesaid, and his, her, or their executors, administrators, and assigns, and if more than one in equal shares, as between or among brothers and sisters; But so that the child or the children collectively of any deceased child of mine shall take only the share which such deceased child

When residue is distributed, fund to be set apart for annuity for wife;

—reducible on her marriage;

—in bar of dower.

Residue to issue as wife shall appoint,

—in default, to children at twenty-one or on marriage with consent;

1. WILL OF A FARMER.

would have taken if living (*a*). BUT I DIRECT, that any monies which in my lifetime I may have advanced to or for the benefit of any child of mine shall be allowed for as part of the share of such child or of such child's issue; [And that no child or grandchild, to whom or to whose issue any appointment shall be made, shall take any benefit under the foregoing gift in default of appointment, without bringing into distribution or allowing for the benefit of such appointment]. I AUTHORISE my trustees or trustee to apply or allow my wife during her widowhood to receive all or any part of the income, (not otherwise applicable under my will), from the actual or presumptive legacy, share, or interest of any minor, for his or her maintenance and education, and to invest and accumulate any surplus and add the same to the capital (*b*), But with

—advancements to be allowed for. Hotchpot.

Maintenance.

(*a*) [Or omit the gift of a life income to the wife, and give her a share of the residue—

Variation giving wife an equal share in residue with children, in lieu of a life income.

"I GIVE the residue of my personal estates and effects UNTO my said wife, if she survive me*, and such child or children of mine living at my decease, and such child or children of any child or children of mine dead before me as shall attain the age of twenty-one years or marry with such consent as aforesaid, in equal shares as between or among brothers and sisters, and so that my wife shall take an equal share with any one of her children, But so that the child or the children collectively of a deceased child shall take only the share which such deceased child would have taken if living. AND I DECLARE, that the provision hereby made for my wife shall be in lieu of all her dower and freebench."]

(*b*) [*or*, "I AUTHORISE my trustees or trustee to apply or allow my wife during her widowhood to receive all or any part of the income (not otherwise applicable under my will) from any legacy or share or shares of my residuary estate, to which any minor or minors shall be actually or presumptively entitled, for his, her, or their maintenance and education or benefit; and, if more than one, in such proportions as my trustees or trustee shall think proper."]

Power to apply maintenance fund for benefit of minors in unequal proportions.

[This seems better than to measure the maintenance of each minor by the amount of his presumptive share, which obliges the trustees to keep a distinct account for each.]

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* [When a fund is given to a person or persons by name, together with the unascertained members of a class, as tenants in common, the death of the former in the testator's lifetime would not, it is conceived, occasion any lapse; but it is better to exclude the question by express words.]

1. WILL OF A FARMER.

power to apply such accumulations for the maintenance and education of any minor or minors actually or presumptively entitled thereto; AND to raise and apply for the advancement in life or benefit of any minor not more than one-half of his or her presumptive or vested legacy or share. AND, for better enabling my trustees or trustee to perform my will, I GIVE all my freehold and customary hereditaments (including mortgage and trust estates) to such uses as my trustees or trustee for the time being, or the acting executors or administrators of a sole trustee, shall at any time or times before the expiration of twenty-one years from the decease of the survivor of my trustees herein named by deed appoint; AND, subject thereto, I GIVE my said freehold estates unto and to the use of the persons or person who shall be my trustees or trustee at my decease, their, his, or her heirs and assigns for ever, subject to the trusts aforesaid, and, as to mortgage and trust-estates, to the equities and trusts affecting them; AND I DECLARE, that my heir, to whom I allow my customary estates to descend, subject to the foregoing power of appointment, shall hold the same subject to the trusts of my will and to the control of my trustees or trustee. I DECLARE, that my trustees or trustee may sell my real estate or other trust-property at any time or times, in any manner and upon any terms in their, his, or her absolute discretion, and as if they, he, or she were absolute beneficial owners of all my real and personal estate; And may sell my farming business, and any property engaged in it, to any son of mine, at a valuation, and take his bond or other security for payment of all or part of the purchase-money within —— years; AND that no purchaser shall see to the application of any purchase-money, or make any objection to anything my trustees or trustee may do in or concerning any sale, on the ground of their, his, or her fiduciary character; AND that my trustees or trustee may sell upon credit; And may retain for such time as they, he, or she shall think fit, any personal or other investments or securities I may leave; And may adjust, settle, allow, compound, waive, suspend, take or give personal or other security for, or refer to arbitration, accounts relating to, and claims which may be made against or on behalf of my estate, whether legally provable or enforceable or not; AND may invest any trust-monies in the funds or on security of real estate or railway debentures, and may vary any investments of trust-monies. I AUTHORISE my trustees or trustee, in their or his discretion, to apportion and allot my real and personal estates or any

Advancement.

Power to trustees to appoint freeholds and copyholds;

—subject thereto, freeholds to trustees in fee;

—heir to hold copyholds, subject to trusts of will.

Discretionary powers as to sale of real estate;

—indemnity to purchasers;

—trustees may sell on credit;

—retain testator's investments;

—adjust claims, &c.;

—invest and change investments.

Power to apportion realty and personalty

parts thereof among and to the persons entitled thereto, or any of them; and, if my trustees or trustee think fit, for equality of partition, to sell or mortgage the same or any part thereof, or charge any sum or sums on any part or parts. I DECLARE, that if any person hereby named or hereafter being a trustee of my will be now dead, or should die or go to reside out of or be absent for a year from England and Wales, or suffer his or her estate and effects to become vested in assignees in bankruptcy or insolvency, or make any assignment for the benefit of creditors, or disclaim, neglect, refuse, or be incapable to perform, or desire to retire from, the office, it shall be lawful for the disclaiming or retiring trustee or trustees, being competent and willing to exercise this power, jointly with the continuing trustees or trustee (if any), or, if no trustee disclaim or retire and be competent and willing to exercise this power, for the other trustees or trustee (being competent), or, in case of the death of an only trustee, for such trustee by will, or in default thereof, or if there be no such trustee, for the acting executors or administrators of the last surviving or continuing trustee, or, if there be no such person, for my acting executors or administrators, to appoint by writing, attested by one witness, a trustee in the room of such person; And that it shall not be necessary to supply several vacancies at the same time; And that every instrument purporting to be made in pursuance of the foregoing power, and not appearing on the face of it to be invalid, shall, though not so made, be valid for all purposes other than the exoneration of parties to the making thereof from responsibility; And that every trustee appointed under this power shall immediately have the powers of a trustee, although the trust-property be not then vested in him; And that the acting executors or administrators of an only trustee may exercise all the powers of such trustee. AND I DECLARE, that the receipt in writing of my trustees or trustee for any trust-monies or trust-property shall discharge the person or persons paying or transferring the same from responsibility for the application thereof, or for the propriety or regularity of the payment or transfer thereof, or of any transaction leading thereto; AND that no trustee shall be answerable for any co-trustee, banker, broker, bailiff, or agent, or for any involuntary loss; AND that each trustee may receive all his or her expenses incident to the performance of the trusts; AND that every trustee, being an attorney or solicitor, or auctioneer or appraiser, may give

among cestuis que trust.

Power to appoint new trustees.

Trustees' receipt clause.

Indemnity to trustee.

1. WILL OF A FARMER.

Testimonium.

advice and transact business in relation to the trusts, and charge for the same as if he were not a trustee. IN WITNESS whereof I have hereunder set my hand this —— day of ——, and I have also set my hand to each of the [*six*] preceding sheets (*a*) of this my will.

[*Testator's Signature or Mark.*]

Attestation;

Signed by the said testator, [with his mark], as his last will and testament, in the presence of us, present at the same time, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses (*b*). [*Two witnesses.*]

—of signature by amanuensis (*c*).

Signed by [*amanuensis*], as the last will and testament of the said testator, in his presence, and by his direction, in the presence of us, present at the same time, who, at the request of the said testator, in his presence, and in the presence of each other, have subscribed our names as witnesses. [*Two witnesses.*]

(*a*) [If the testator's strength is likely to fail, he should sign the last sheet, and have it attested, before he attempts to sign the other sheets.]

Attestation of a will containing alterations.

(*b*) [If the will contains interlineations or erasures (which latter should be made with a pen, so as to shew how the will originally stood), add—

"the said testator having, before signing the same, caused the words, "[*interlined words*]," to be inserted between the fourth and fifth lines of the third page; and the words, "[*erased words*]," to be erased from the ninth and tenth lines of the same page; and the words, "[*substituted words*]," to be interlined in lieu thereof."]

(*c*) [The amanuensis should sign the testator's name. But a signature by the amanuensis in his own name has been held sufficient. He may be a witness.]

2. [WILL *of a* WIDOWER, *devising certain* SPECIFIC FREEHOLD *and* COPYHOLD ESTATES *to each of his* THREE DAUGHTERS *respectively for* LIFE, *for their separate Use, with Power to* APPOINT LIFE ESTATES *to their surviving* HUSBANDS, *and a* POWER *of Selection among their respective Children or more remote Issue. In default of Appointment, the Estates devised to each Daughter to go to* HER CHILDREN *as Tenants in Common in Fee.* CROSS-EXECUTORY LIMITATIONS *between the several Families. The* RESIDUE *of the Testator's* REAL *and* PERSONAL ESTATES *to form* ONE FUND, *to be held upon Trusts similar to the Uses and Trusts limited of the real Estates specifically devised, in such Manner as to* COMPENSATE *for any* INEQUALITIES *in the* VALUES *of the* ESTATES SPECIFICALLY DEVISED. *Powers of Maintenance and Advancement out of the Real and Personal Estates. Powers of Leasing, Selling, Exchanging, &c. Provision for* INDEMNITY *of Testator and his Co-trustee under his Daughter's Marriage Settlement, against a* BREACH *of* TRUST.

2. SPECIFIC DEVISES: TENANTS FOR LIFE TO REPAIR AND INSURE.

I, [*testator*], of &c., HEREBY REVOKE all wills and testamentary instruments heretofore by me made, and declare this to be my last and only will and testament. I APPOINT my friends, [*names*], of &c., to be my executors in respect of such debt or debts (if any) as may be owing to me from my brother, [*name*], of &c.; and I APPOINT my said brother, [*name*], and the said [*names*], to be my executors as to the residue of my personal estate, and to be trustees of my will and guardians of my children, and I GIVE to each of them, as such executor and trustee, the sum of £——. I GIVE, DEVISE, AND APPOINT all the freehold and copyhold hereditaments vested in me upon any trust or by way of mortgage, TO SUCH USES as my said trustees or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, shall, at any time or times before the expiration of twenty-one years from the death of such survivor, by deed appoint; And, subject thereto, I GIVE, DEVISE, AND APPOINT the said freehold and copyhold hereditaments TO THE USE of my said trustees, their heirs and

Appointment of executor as to a specific debt, and appointment of the debtor and others executors as to the residue.

Legacy to executors.

Devise of trust estates.

2. SPECIFIC DEVISES: TENANTS FOR LIFE TO REPAIR AND INSURE.

assigns for ever. And I CHARGE all my freehold and copyhold hereditaments situate at Thorpe, in the said county of ——, and all my freehold land at Redham aforesaid, which I purchased of John Wood, with four cottages which I have erected thereon, with the full and complete exoneration and indemnification of, in the first place, the said [*one of the trustees*], his heirs, executors, and administrators, and estate and effects, and then of my other real estates and my personal estate, from and against all liabilities, demands, losses, costs, charges, and expenses whatsoever, incurred or to be incurred or sustained in consequence of the execution by me and the said [*trustee*] of a deed of composition, dated &c., whereby we have agreed to accept a composition for, and have discharged a debt or sum of £——, secured by the bond of my son-in-law, [*name*], to me and the said [*trustee*], as trustees of the settlement made upon the marriage of my daughter, [*eldest daughter*], the wife of the said [*son-in-law*]; And I authorise my said trustees or trustee for the time being from time to time to raise, by sale or mortgage of all or part of the said hereditaments, or otherwise therefrom, such monies as they or he shall deem necessary for the purpose of such exoneration and indemnification, and to apply the same accordingly. And, subject thereto, I GIVE AND DEVISE all my said hereditaments at Thorpe, and my said freehold land at Redham, purchased of John Wood, with the four cottages thereon, Unto and to the use of my said daughter, [*eldest daughter*], during her life, for her sole, separate, and inalienable use during her present or any future coverture. And, after her decease, To such uses and upon such trusts, for the benefit of any surviving husband of my said daughter, as to all or any part of the said hereditaments and for any period not exceeding the term of his life, as my said daughter shall, by will, notwithstanding coverture, or (being unmarried) by deed, appoint. And, subject thereto, To such uses and upon such trusts for the benefit of all or any of my said daughter's children or more remote issue (born in her lifetime), as she shall (notwithstanding coverture) at any time or times by deed, revocably or irrevocably, or by will appoint, but so that no infant and unmarried child or other issue shall take a vested interest under any such appointment in the lifetime of my said daughter. And, subject thereto, To the use of such child or children of my said daughter as shall be living after my decease, and such child or children of any child or children of my said daughter who shall be dead at

Charge of certain hereditaments with indemnity to testator and his co-trustee against liability for a certain breach of trust;

—subject thereto devise to eldest daughter for life;

—power to appoint life-interest to husband;

—power to appoint the fee among her issue;

—in default of appointment to children and issue of deceased children, with cross-

2. SPECIFIC DEVISES: TENANTS FOR LIFE TO REPAIR AND INSURE.

my decease, as shall survive me, and if more than one, in equal shares as between or among brothers and sisters, and his, her, or their heirs and assigns for ever, but so that the child or the children collectively of a deceased child shall take only the share which such deceased child would have taken if living. But in case any of such children or grandchildren should die under the age of twenty-one years without leaving issue, then I GIVE, DEVISE, AND APPOINT his, her, or their share or shares (as well under this substitutionary limitation as under the foregoing original limitation), To THE USES herein limited concerning the other share or shares of the said hereditaments: PROVIDED, that no child or grandchild shall take under the foregoing limitation in default of appointment, without bringing into distribution or allowing for the benefit of any appointment which shall have been made to him or her or to his or her issue. AND if no child or grandchild of my said daughter should be living after my decease, and attain the age of twenty-one years or die under that age leaving issue, then, subject to any such appointment as aforesaid, and as to one moiety of the said hereditaments, To AND UPON THE USES AND TRUSTS and with the powers hereinafter limited and contained concerning my hereditaments at Easton, purchased of James Watt; And as to the other moiety thereof, To AND UPON THE USES AND TRUSTS and with the powers hereinafter limited and contained concerning my hereditaments at Easton, purchased of John Hutton. AND I GIVE, DEVISE, AND APPOINT all my copyhold hereditaments at Easton, in the said county of ——, which I purchased of James Watt, and to which my daughter, [*second daughter*], the wife of [*name*], has been admitted in trust for me, And all my copyhold hereditaments at Redham aforesaid, which I purchased of Charles Reed, with the cottages erected thereon, To AND UPON SUCH OR THE LIKE USES AND TRUSTS, and with such or the like powers in favour or for the benefit of my said daughter, [*second daughter*], her surviving husband, and her issue, as are hereinbefore limited, expressed, and contained as to my said hereditaments at Thorpe, concerning the said [*eldest daughter*], her surviving husband, and her issue; And, subject thereto, as to one moiety of the hereditaments lastly hereinbefore devised, To AND UPON THE USES AND TRUSTS and with the powers hereinbefore limited and contained concerning my hereditaments at Thorpe (including the charge, trust, and provisions hereinbefore contained for the

limitations of shares of children dying under twenty-one without issue;

—in default of such issue, to similar uses in favour of other daughters, their husbands, and issue, by reference.

Devise of another estate to similar uses in favour of second daughter, her husband, and issue;

—on failure of such uses, to similar uses in favour of other two daughters, their husbands, and issue.

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exoneration and indemnification of the said [*trustee*], his heirs, executors, and administrators, and estates and effects, and of my other real and personal estates; And as to the other moiety thereof, To AND UPON THE USES AND TRUSTS and with the powers hereinafter limited and contained concerning my hereditaments at Easton aforesaid, purchased of James Hutton. AND I GIVE, DEVISE, AND APPOINT all my freehold and copyhold hereditaments at Easton aforesaid, which I purchased of James Hutton, To AND UPON SUCH OR THE LIKE USES AND TRUSTS and with such or the like powers in favour or for the benefit of my daughter, [*third daughter*], her surviving husband, and her issue, as are hereinbefore limited, expressed, and contained as to my said hereditaments at Thorpe, concerning the said [*eldest daughter*], her surviving husband, and her issue; And, subject thereto, as to one moiety of the hereditaments lastly hereinbefore devised, To AND UPON THE USES AND TRUSTS and with the powers hereinbefore limited and contained concerning my hereditaments at Thorpe, (including the said charge, trust, and provision for exoneration and indemnification); And as to the other moiety thereof, To AND UPON THE USES AND TRUSTS and with the powers hereinbefore limited and contained concerning my hereditaments at Easton, purchased of James Watt. AND I AUTHORISE every person to whom a life-estate in any hereditaments is hereby given, [or shall be appointed under any power hereinbefore given for that purpose], after her or his majority, and after her or his estate shall have fallen into possession, and my said trustees or trustee, as to any hereditaments whereof for the time being there shall be no adult tenant for life or for any greater estate in possession, from time to time to lease the same, or any parts thereof, for not more than twenty-one years, at rack-rent; But so as not to cause a forfeiture of any copyhold hereditaments. AND I AUTHORISE my said trustees or trustee, with the consent in writing of the person or persons who for the time being shall be entitled in possession to any hereditaments for life, or for any greater estate, if of age and of sound mind, and during the minority or minorities or incapacity of such person or persons, at the discretion of my said trustees or trustee, from time to time to grant leases of any of such hereditaments for mining, building, repairing, or improving purposes, of such durations, for such considerations by way of premium or rent, and upon such conditions, as they or he shall deem expedient; AND to join in any partition of any of such hereditaments; AND to exchange any of such hereditaments for

Devise of a third estate to similar uses in favour of third daughter, her husband, and issue;

—on failure of such uses, to similar uses in favour of other daughters, their husbands, and issue.

Leasing power to tenants for life.

Power to trustees to grant mining, building, and improving leases;

—to partition, exchange, and enfranchise;

2. SPECIFIC DEVISES: TENANTS FOR LIFE TO REPAIR AND INSURE.

other freehold or copyhold hereditaments in England or Wales, in fee-simple or held upon renewable lease for lives or years, or for an absolute unexpired term of not less than sixty years, to be conveyed, surrendered, or assigned as nearly as may be to the uses and upon the trusts affecting the hereditaments so given in exchange immediately before such exchange, (subject, as to any renewable leaseholds, to the payment of the expenses incident to such renewal, out of the income of such leaseholds), And to enfranchise or grant licenses to demise any copyhold or customary hereditaments held of any manor which shall be subject to the foregoing powers. AND to sell all or any of the said hereditaments, together or in parcels, by auction or private contract, subject to any special stipulations as to biddings, title, evidence of title, expenses, compensation, indemnity, arbitration, postponement of payment of or security for purchase-money, or otherwise; With power to buy in at any sale or to rescind or vary any contract of sale, and to resell. AND I DIRECT that the monies for equality of partition or exchange, purchase-monies, or other gross sums, (not in the nature of permanent yearly income), to be received upon the exercise of any of the aforesaid powers, shall, with such consent or at such discretion as aforesaid, be invested by my said trustees or trustee in the purchase of such hereditaments as are hereinbefore authorised to be taken in exchange, or in the public funds or on real securities in England or Wales, (and not in Ireland), to be respectively settled and held to and upon uses and trusts, and subject to powers corresponding as nearly as may be with the uses, trusts, and powers herein declared and contained concerning the hereditaments in respect of which such monies shall have been received; With power for my said trustees or trustee from time to time, with such consent or at such discretion as aforesaid, to vary such investments. AND I AUTHORISE my trustees or trustee, in exercise of any power of exchange or purchase herein contained, to submit to any special conditions, and to accept such title or titles as they or he shall think safe, whether strictly marketable or not, and at their or his discretion to waive any objections, requisitions, or inquiries relating to the title or the conveyance of any purchased or exchanged hereditaments which they or he may be entitled, or, but for this authority, would be bound to insist on or make. AND I DIRECT that each tenant for life, or for any less estate, of any hereditaments, shall, during her or his estate, keep the buildings thereon in good and substantial

—to sell;

—investment;

—power to vary investments;

—power to purchase, subject to special conditions, &c.

Tenants for life to repair and insure;

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repair and insured in the names or name of my said trustees or trustee, in some respectable office or offices of insurance against damage by fire, to the full value thereof; And that the monies to be received under every such insurance shall be applied in reinstating the property in respect whereof the same shall become payable; And that, if any such person should neglect to effect such repairs as aforesaid within six calendar months after being thereunto requested in writing by my said trustees or trustee, or to effect or keep on foot such insurance, or to produce to my said trustees or trustee, upon demand, the receipt for each premium thereon within fourteen days after the same shall have first become payable, it shall be lawful for (but not incumbent on) my said trustees or trustee, out of any trust-monies in their or his hands, to effect such repairs or to effect or keep on foot such insurance, and to deduct the expenses thereof, with interest thereon after the rate of £5 per centum per annum, from any monies which shall then or afterwards be payable to such person, or to recover such expenses and interest, with all costs incidental to the recovery thereof, by distress or entry upon and perception of the rents and profits of any hereditaments to which such person shall be entitled for any estate or interest, either by original limitation or by appointment under my will. AND I GIVE, DEVISE, APPOINT, AND BEQUEATH all my freehold and copyhold hereditaments not hereinbefore disposed of, And all my leasehold and personal estates and effects, as to the said freehold and copyhold hereditaments, To SUCH USES as my said trustees or trustee for the time being, at any time or times before the expiration of twenty-one years from the decease of the survivor of my trustees herein named, shall by deed appoint. And, subject thereto, and as to all my said residuary freehold, copyhold, and leasehold hereditaments and personal estate, [*or*, as to such of my said estates of inheritance as are of freehold tenure, and my leasehold hereditaments and personal estate], UNTO AND TO THE USE of the said [*trustees*], their heirs, executors, administrators, and assigns respectively, upon the following trusts. I AUTHORISE my said trustees or trustee, at any time or times, if they or he should think fit, to sell my said residuary real estates, together or in parcels, by auction or private contract, subject to any special stipulations as to biddings, title, evidence of title, expenses, compensation, indemnity, arbitration, postponement of payment of or security for purchase-money, or otherwise, With power to buy in at any sale,

—on their default, trustees may repair and insure, and recover costs by distress and entry.

Residuary devise and bequest to trustees, with power of appointment.

Discretionary power to sell real estates.

2. SPECIFIC DEVISES: TENANTS FOR LIFE TO REPAIR AND INSURE.

or to rescind or vary any contract, and to resell. AND I DIRECT that the produce of any such sales shall be held upon the trusts hereinafter declared concerning my residuary personal estate; And that my said residuary estates of inheritance and the income therefrom shall be held (subject to such discretionary power of sale) upon trusts corresponding as nearly as may be with the trusts hereinafter declared concerning my residuary personal estate; And in the administration of such trusts, I AUTHORISE my trustees or trustee, in their or his absolute discretion, to partition or allot such real estates or any of them among or to the respective actual or presumptive objects of the trusts, or any of such objects, in such manner and charged or not with such sum or sums for equality of partition as they or he shall think right. AND I DIRECT my trustees or trustee to sell and convert into money my leaseholds (if any), growing crops, farming-stock, and residuary personal estate, in such manner and at such times as they or he shall deem expedient, With full discretionary power to compound, release, waive, suspend, leave on personal or other security, refer to arbitration, settle, or otherwise deal with any debts or claims which at any time or times may be owing to or from or be made on behalf of or against my estate, whether legally payable or enforceable or not; And after payment of my funeral, testamentary, and trust expenses, debts, and legacies, [with the consent in writing of my said daughter, [*eldest daughter*], and after her decease with the like consent of my said daughter, [*second daughter*], and after her decease with the like consent of my said daughter, [*third daughter*], and after the decease of the survivor of them, at the discretion of my said trustees or trustee], to invest such parts of my residuary personal estate as shall not be already so invested, and the produce of the said residuary real estates, in the public funds or upon real securities in England or Wales, (and not in Ireland), or in the purchase of such hereditaments as might be taken in exchange under the power hereinbefore contained; And I AUTHORISE my said trustees or trustee from time to time [with such consent or at such discretion as aforesaid] to vary the investments of any trust-monies under my will; AND to lease any hereditaments which shall be subject to the trusts of my residuary estate for any absolute term of years in possession, not exceeding twenty-one years, at a rack-rent; AND to grant leases of any of such hereditaments for mining, building, repairing, or improving purposes, of such durations, for such

Real estate to be held on same trusts as personalty.

Power to partition residue.

Conversion of personalty;

—discretionary powers.

Investment;

—power to purchase lands.

Power to grant leases;

—mining, building, and improving leases;

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considerations by way of premium or rent, and upon such conditions, as they or he shall deem expedient, AND to join in any partition of any of such hereditaments; AND to exchange any of such hereditaments for any other hereditaments of the kind hereby authorised to be purchased; AND to enfranchise or grant licenses to demise any copyhold or customary hereditaments held of any manor which shall be subject to the trusts of my residuary estate; AND I DECLARE, that my said trustees or trustee shall be seised and possessed of the hereditaments so to be taken in exchange, and of the fines, premiums, monies for equality of partition and exchange, and other gross sums to be received upon the exercise of any of the aforesaid powers, as part of my residuary estate. [BUT, as to such of my leasehold estates as at my decease shall be held for any unexpired term of less than sixty years, my trustees or trustee shall, in their or his absolute discretion, estimate the probable permanent income which would be realised by the sale thereof and investment of the produce in the Consolidated Three Pounds per Centum Annuities, with liberty to vary such estimate from time to time as they or he shall see reason; And, until such estates are sold, shall apply so much of the rents and profits thereof as shall equal such estimated income, in such manner as if the same were income from the produce of such sale; And from time to time, until such sale, shall invest the surplus of such rents and profits, and the income from such investment, and add the same to the capital fund of my residuary estate. AND, as to any reversionary estates not yielding a present income, my trustees or trustee shall, in their or his absolute discretion, estimate the probable permanent income which would be realised by a sale thereof and investment of the produce in the Consolidated Three Pounds per Centum Annuities, with liberty to vary such estimate from time to time as they or he shall see reason; And, until such estates are sold, shall from time to time, out of any part of the capital of my said residuary estate, set apart to the credit of or actually raise and pay to the person or persons who from time to time would be entitled to receive such permanent income, a sum or sums equivalent thereto]; [*or, if such be the intention,* AND shall apply the income from my leasehold estates and other property, (whatever may be the duration of my estate or interest therein respectively), until sold, in such manner as if the same were income from the produce of such sale.] AND I DECLARE, that my said

—to partition or exchange;

—to enfranchise.

Special direction as to income of leaseholds, and as to reversions.

[Actual income from unconverted property to be applied as such.]

2. SPECIFIC DEVISES: TENANTS FOR LIFE TO REPAIR AND INSURE.

trustees or trustee [shall receive the rents and profits of my customary estates until sold and(*a*)] shall be possessed [thereof and] of my residuary real [*or*, freehold, leasehold] and personal estate, and the produce thereof, [and of my said customary estates], upon the trusts hereinafter expressed. I DIRECT that my said trustees or trustee shall, as soon as conveniently may be after my decease, cause the several freehold hereditaments hereinbefore particularly mentioned and specifically devised, and also my said residuary real and personal estate, to be respectively valued by some competent person or persons, to be appointed for that purpose by my said trustees or trustee.

Trustees to cause estates specifically devised to be valued.

AND I DIRECT that my said trustees or trustee shall set apart such a portion of my said residuary real and personal estates as shall, together with the value (so to be ascertained as aforesaid) of my said hereditaments hereinbefore specifically devised for the benefit, in the first instance, of my said daughter, [*eldest daughter*], (without regarding or making any allowance for the said charge thereon for exoneration and indemnification hereinbefore contained), be equal in amount or value to one equal third part of the total value (so to be ascertained as aforesaid) of all my specifically devised hereditaments and my said residuary real and personal estates taken together, And shall be possessed of such part or proportion, UPON TRUSTS and subject to powers corresponding as nearly as may be with the uses, trusts, and powers hereinbefore limited and contained concerning my said hereditaments at Thorpe, (including the said charge, trust, and provision for exoneration and indemnification); AND shall set apart such other portion of my said residuary real and personal estates as shall, together with the value (so to be ascertained as aforesaid) of my hereditaments hereinbefore specifically devised for the benefit, in the first instance, of my said daughter, [*second daughter*], be equal in amount or value to such equal third part as aforesaid, And shall be possessed of such other part or proportion, UPON TRUSTS and subject to powers corresponding as nearly as may be with the uses, trusts, and powers hereinbefore limited and contained concerning my said hereditaments at Easton, purchased of James Watt, AND shall be possessed of the remaining portion of my said residuary real and personal estate, UPON TRUSTS and subject to powers corresponding as

Gift of residuary realty and personalty, for benefit of daughters and their husbands and issue, by reference, in such proportions as to make all their shares under the will equal in value.

(*a*) [If the copyholds are devised to the trustees, this authority to receive the rents will be unnecessary.]

2. SPECIFIC DEVISES: TENANTS FOR LIFE TO REPAIR AND INSURE.

nearly as may be with the uses, trusts, and powers hereinbefore limited and contained concerning my said hereditaments at Easton, purchased of John Hutton. AND I GIVE to my said daughter, [*second daughter*], a legacy of £——, and to my said daughter, [*third daughter*], a legacy of £——, for their respective sole and separate use. AND I BEQUEATH to my said trustees a legacy of £——, UPON TRUST that my said trustees or trustee shall invest the same in the public funds, or on real security in England or Wales, (and not in Ireland), with power from time to time to vary such investments, And shall stand possessed of the said sum and of the securities for the same, UPON TRUSTS and subject to powers corresponding as nearly as may be with the uses, trusts, and powers hereinbefore limited and contained concerning my said hereditaments at Thorpe, (including the said charge, trust, and provision for exoneration and indemnification). AND I AUTHORISE my said trustees or trustee (subject to any life-interest which may be subsisting under my will in any adult person or persons) to receive the rents and profits of the several hereditaments hereby devised during the minority or respective minorities of the person or persons presumptively entitled thereto, And during the minorities of each of my children and grandchildren, or more remote issue, to apply the whole or a competent part of the income arising from his or her presumptive or vested share or shares or estate in any real or personal property under my will, towards his or her maintenance and education, And to invest the surplus (if any) of such income in the public funds or on real securities in England or Wales, (and not in Ireland), and to hold the same upon trusts corresponding with the trusts or uses of the share, fund, or estate from whence it shall have been derived, with power to apply the capital of such accumulations towards the maintenance and education of the person or persons for the time being presumptively entitled thereto; AND I AUTHORISE my said trustees or trustee, by sale or mortgage or otherwise, to convert into money and apply any part not exceeding one-half of the presumptive or vested share or shares of any of my grandchildren or more remote issue, in any property under my will, for his, her, or their advancement in the world, such conversion and application to be made with the consent in writing of the mother of each such grandchild respectively, and, after her decease, at the discretion of such trustees or trustee; AND I AUTHORISE, but do not require, my said trus-

Legacies to second and third daughters.

Legacy to trustees to be invested for benefit of eldest daughter, her husband, and issue.

Power to trustees to receive income of infants' shares for maintenance.

Power to raise by sale or mortgage a moiety of any infant's share for advancement.

Authority to

tees or trustee, unless otherwise directed in writing by my said daughter, [*second daughter*], to defer and postpone the calling in of any debt or debts carrying interest which may be owing to me from her said husband, [*name*], at the time of my decease, for such period as they or he shall think proper; AND I DECLARE, that the said debt or debts shall, in the valuation, distribution, and appropriation of my residuary personal estate under the foregoing trusts, be taken at the nominal amount or amounts thereof, and be appropriated, so far as the same, taken at such amount or amounts, shall be required or be applicable, in or towards satisfaction of the share of the produce of my residuary real and personal estates hereinbefore settled upon trusts and subject to powers corresponding with the uses, trusts, and powers hereinbefore limited and contained concerning my hereditaments at Easton, purchased of James Watt; Nevertheless, the foregoing power to leave the said debt or debts outstanding shall extend to the full amount or amounts of such debt or debts, whether the same shall exceed the amount of the last-mentioned share or not. (*Trustee clauses*, (80*a*[1]), *&c.*) IN WITNESS &c.

postpone calling in debt due from son-in-law;

—debt to be taken at its nominal amount in distribution of residue.

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

3. WILL *of a* MARRIED WOMAN, *who has an Infant Daughter by her first Husband, and no Issue by her present Husband. Freeholds and Copyholds were settled on her second Marriage, in Default of Issue by that Marriage, to such Uses as she should appoint; but the Copyholds included in that Settlement, and other Copyholds articled to be settled on her first Marriage, having never been surrendered by her, she now (by virtue of a Surrender to the Uses of her Will)* APPOINTS *them to the Uses of the respective Settlements. And, in Default of Issue by her present Husband, she* APPOINTS *the Estates settled on her second Marriage to the Use of her* DAUGHTER *for* LIFE, *with Remainder to her Daughter's* CHILDREN *in Fee; with* CROSS LIMITATIONS *on Death under Twenty-one without Issue. Usual Powers of Leasing, Management, &c.* BEQUEST *of* SAVINGS *of* SEPARATE ESTATE. *A. B., during Daughter's Minority, and afterwards the Trustees of the second Settlement, to be Trustees of the Will. Appointment of* GUARDIAN *of Daughter, and Direction to* APPLY *to* COURT OF CHANCERY *for* CONFIRMATION.

I, [*testatrix*], the wife of [*husband*], of &c., HEREBY revoke all wills and testamentary instruments heretofore by me made, and declare this to be my last and only will and testament: WHEREAS, by an indenture made on the —— day of ——, between myself, by my then name and description of [*former name*], widow, of the first part, my said present husband, [*name*], of the second part, and [*trustees of settlement*], of the third part, (being a settlement made in contemplation of my marriage with my said present husband), the freehold hereditaments therein described were appointed, released, or otherwise assured, To the use of myself, my heirs and assigns, until the solemnisation of the said then intended marriage; And, after the solemnisation thereof, To the use of the said [*trustees of settlement*], their executors, administrators, and assigns, during the term of ninety-nine years, upon certain trusts determinable with my now existing coverture (being trusts for securing the payment to me of an annuity of £——,

Recital of settlement on second marriage, limiting freehold (subject to pin-money) to use of husband for life, then to testatrix for life, then to children; in default of children, to such uses as testatrix should appoint by deed or will;

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

for my separate use, in the nature of pin-money); And, subject to the said term and the trusts thereof, To the use of the said [*husband*], and his assigns, during his life, With remainder to the use of the said [*trustees of settlement*], and their heirs, during the life of the said [*husband*], With remainder to the use of myself and my assigns, during my life, With remainder to the use of the said [*trustees of settlement*], and their heirs, during my life, With remainder, if there should have been any child or children of mine by the said [*husband*], To certain uses in the said indenture of settlement limited and declared; And in case there should be no child of mine by the said [*husband*], or in case the child if only one, or if more than one all the children of mine by the said [*husband*], should depart this life under the age of twenty-one years without leaving issue, then, To such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations as I, notwithstanding my said then intended or any future coverture, by any deed or deeds, or by my last will and testament or any testamentary writing, should from time to time appoint; And subject thereto, To the use of myself, my heirs and assigns for ever; And, by the indenture now in recital, I and the said [*husband*] did covenant with the said [*trustees of settlement*], their heirs and assigns, that all the copyhold hereditaments described in the indenture now in recital (of which copyhold hereditaments I had previously been admitted tenant in fee-simple) should be surrendered To such uses, upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, agreements, and declarations as (regard being had to the difference in the natures and qualities of the premises) would best or nearest correspond with the uses, trusts, intents, purposes, powers, provisoes, agreements, and declarations thereinbefore expressed and declared of and concerning the said freehold hereditaments and premises comprised in and settled by the indenture now in recital. AND WHEREAS, by another indenture of even date with and made between the same persons who are parties to the above recited indenture, (being an indenture of settlement made in pursuance of articles entered into on my marriage with [*first husband*], my deceased husband), I and the said [*present husband*] did covenant with the said [*trustees of settlement*], their heirs and assigns, that all the copyhold hereditaments described in the indenture now in recital (of

—of covenant to surrender copyholds to the like uses;

—of settlement (in pursuance of articles on first marriage) by covenant to surrender copyholds to the use of testatrix for life, then to use of daughter by first husband in

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

which copyhold hereditaments I had previously been admitted tenant in fee-simple) should be surrendered To the use of myself and my assigns during my life, with remainder To the use of [*name*], (my daughter by my said deceased husband), her heirs and assigns for ever; But, if the said [*daughter*] should depart this life under the age of twenty-one years without leaving lawful issue living at the time of her decease, To the use of myself, my heirs and assigns for ever. AND WHEREAS, in each of the hereinbefore recited indentures, it is provided, that, for the purpose of saving expense, it should be lawful for me, notwithstanding my intended coverture, to devise the said copyhold hereditaments therein respectively covenanted to be surrendered, To the uses which at the time of my decease should be subsisting under the limitations or estates therein respectively created, and such devise should be deemed and taken as a satisfaction of such covenant; AND WHEREAS the said copyhold hereditaments respectively comprised in and settled by the firstly and secondly hereinbefore recited indentures have not nor has any part of them been surrendered according to the terms of the respective covenants hereinbefore recited, But all the said copyhold hereditaments have been duly surrendered to such uses as I should by my last will and testament, notwithstanding any coverture, limit or appoint; AND WHEREAS there has been no issue of my said marriage with my present husband; AND WHEREAS the said [*former husband*], my late husband, having duly made and published his last will and testament, bearing date &c., and thereby appointed me sole executrix thereof, departed this life on or about the —— day of ——, without having revoked or altered his said will, which was, on or about the —— day of —— following, duly proved by me in the Prerogative Court of the Archbishop of Canterbury; Now, I DO HEREBY DIRECT, LIMIT, APPOINT, AND DEVISE, that all and singular the copyhold hereditaments comprised in the firstly hereinbefore recited indenture shall, from and immediately after my decease, be and remain to the uses and for the estates thereof limited by the same indenture, and which shall then be subsisting and capable of taking effect. AND I DO FURTHER DIRECT, LIMIT, APPOINT, AND DEVISE, that all and singular the copyhold hereditaments comprised in the secondly hereinbefore recited indenture shall, from and immediately after my decease, be and remain to the uses and for the estates thereof limited by the same indenture, and which shall then be subsisting and

fee, and on her death under age without issue to use of testatrix in fee;

—that, in pursuance of provision in each settlement, no surrender of the copyholds has been made;

—that all the copyholds have been surrendered to use of testatrix's will;

—that testatrix is executrix of her first husband.

Appointment of copyholds to uses of the respective settlements.

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

capable of taking effect; AND FURTHER, and in exercise of the said power reserved or given to me by the firstly hereinbefore recited indenture of settlement, And in exercise and pursuance of all other powers and authorities whatsoever me in this behalf enabling, I DO HEREBY DIRECT, LIMIT, AND APPOINT, that, in case there should be no child of mine by my said present husband who shall live to attain the age of twenty-one years, or dying under that age shall leave issue living at his or her death, then all and singular the freehold and copyhold hereditaments comprised in the firstly hereinbefore recited indenture of settlement shall, from and immediately after my decease, (but subject to the life-estate therein of my said husband in case he should then be living), be and remain TO THE USE of my said daughter, [*name*], during her life, for her sole and separate use, independently of the interference or control of any husband or husbands with whom she may intermarry (*a*); And, after the decease of my said daughter, TO SUCH USES and upon such trusts for the benefit of any surviving husband of my said daughter, as to all or any part or parts of the said hereditaments, and for any period or estate not exceeding the term of the life of such husband, as my said daughter shall, (being unmarried), by any deed or deeds, revocable or irrevocable, or (whether married or sole) by her last will and testament, or any testamentary writing, direct, limit, or appoint; And, (subject to any such direction, limitation, or appointment), TO SUCH USES, upon such trusts, for such estate or estates, interest or interests, and with, under, and subject to such powers, provisoes, limitations, charges, and conditions, and in such manner and form in all respects for the benefit of any child, or all or any one or more of the children or other issue of my said daughter, and if more than one in such shares and proportions, as my said daughter shall at any time or times, notwithstanding any coverture, by any deed or deeds, revocable or irrevocable, or by her last will and testament or any testamentary writing, direct, limit, or appoint; And, in default of or subject to any such direction, limitation, or appointment, TO THE USE of the child or children of my said daughter, and if more than one in equal shares and proportions, and his, her or their heirs and assigns for ever; And as to the share or shares of any child or children of my said

Appointment, in case there should be no issue to take under settlement on second marriage,

to daughter by first marriage for life for separate use;

—power to daughter to appoint to surviving husband for life;

—power to appoint to children or their issue;

—in default of appointment, to daughter's children equally in fee, with cross limitations over on death under twenty-one without leaving issue;

(*a*) [The legal estate in the copyholds is given to the daughter in order to avoid the expense of the admittance of the trustees.]

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

daughter who shall die under the age of twenty-one years without leaving issue, To the uses herein limited concerning the other shares or share. PROVIDED ALWAYS, that no child of my said daughter, to whom or to whose issue any appointment shall be made, shall take under the foregoing limitation in default of appointment, without bringing into distribution or allowing for the benefit of such appointment;

—in default of children, to such uses as daughter shall by will appoint, and in default of appointment to her in fee.

And if no child of my said daughter should attain the age of twenty-one years, or die under that age leaving issue, then, To THE USE of such person or persons, for such estates, and in such manner as my said daughter, whether covert or sole, shall, by her last will and testament or any testamentary writing, appoint; And, in default of or subject to any such appointment, To THE USE of my said daughter, her heirs and assigns for ever.

Leasing power to A. B. during minority of daughter, then to daughter, and after her decease to trustees of settlement;

PROVIDED ALWAYS, AND I HEREBY DIRECT, APPOINT, AND DECLARE, that it shall be lawful for my friend, A. B., of &c., his executors or administrators, during the minority of my said daughter, and afterwards for my said daughter, and after the decease of my said daughter, and, during the minority of any person entitled to any estate, share, or interest in the said settled hereditaments, for the trustees or trustee for the time being of the firstly hereinbefore recited indenture of settlement, (but as to any hereditaments whereof or whereto, for the time being, any surviving husband of my said daughter shall be seised or entitled under or by virtue of any appointment to be made in pursuance of the power hereinbefore contained for any legal or equitable estate of freehold, with the consent in writing of such husband), from time to time to demise or lease all or any of the hereditaments which shall for the time being be subject to the uses and trusts hereinbefore limited, or such of them as shall then be subsisting, at a rack-rent, for any absolute term or terms in possession not exceeding twenty-one years, so that in every such lease there be reserved a right of re-entry in case the rent reserved thereby be in arrear for more than twenty-one days, and so that the lessee or lessees execute a counterpart of such lease.

—power to trustees of settlement to grant mining, building, repairing, and improving leases;

AND I FURTHER DIRECT, APPOINT, AND DECLARE, that it shall be lawful for the said trustees or trustee for the time being of the firstly hereinbefore recited indenture of settlement, with the consent in writing of the person or persons who for the time being shall be entitled under or by virtue of the limitations hereinbefore contained to any hereditaments for any estate of freehold, or, during the

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

minority of such person or persons, at the discretion of such trustees or trustee, from time to time to grant leases of such hereditaments, or any parts thereof, for mining, building, repairing, or improving purposes, of such durations, for such considerations by way of premium or rent, and upon and subject to such terms and conditions, as they or he shall deem expedient; AND ALSO to join in any partition of any such —to partition; hereditaments; AND ALSO to exchange any such hereditaments for any other freehold or copyhold hereditaments in England or Wales, in fee-simple, or held under a renewable lease or renewable leases for lives or years, or for any absolute term or terms of years, whereof not less than sixty years shall, at the time of making such exchange, be unexpired, such hereditaments so to be taken in exchange to be conveyed, surrendered, or assigned to uses and upon trusts corresponding, as nearly as circumstances will allow, with the uses and trusts which immediately before such exchange shall affect the hereditaments so to be given in exchange, (but subject as to any renewable leaseholds to the payment of the expenses incident to each renewal out of the income to arise from such leaseholds); AND ALSO, with such consent, or at —to sell. such discretion as aforesaid, to sell all or any of the said hereditaments for the time being subject to the uses and trusts hereinbefore declared or to such of them as shall then be subsisting and capable of taking effect, together or in parcels, by public auction or private contract, and subject or not to any special or other conditions or stipulations as to biddings, title, evidence, expenses, compensation, indemnity, arbitration, postponement of payment of or security for purchase-money, or otherwise, With power to buy in or to rescind or vary any contract relating to any of such hereditaments, and to resell the same. AND I DIRECT, that the fines, premiums, monies for equality of partition or exchange, purchase-monies, and other gross sums not in the nature of yearly income, to be received upon or by means of the exercise of any of the foregoing powers, shall, with such consent or at such discretion as aforesaid, be invested by such trustees or trustee in the purchase of such hereditaments as are hereinbefore authorised to be taken in exchange, or in the public stocks or funds, or on real securities in England or Wales, (and not in Ireland), to be respectively settled and held to uses and upon trusts corresponding, as nearly as circumstances will allow, with the uses and trusts herein limited and declared of or concerning the

Fines and monies for equality of exchange, and purchase-monies, &c., to be invested;

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

hereditaments in respect of which such monies shall have been received, With power for the said trustees or trustee from time to time, with such consent or at such discretion as aforesaid, to vary such investments. AND I HEREBY FURTHER DIRECT AND DECLARE, that it shall be lawful for such trustees or trustee, in the exercise of any power of exchange or purchase herein contained, to submit to any special stipulations or conditions, and to accept such title or titles as they or he shall consider safe, whether strictly marketable or not, and also, at their or his discretion, to waive or dispense with any objections, requisitions, evidence, or assurances, which they or he may be strictly entitled, or but for this authority would be bound, to make, insist on, or procure. AND I DIRECT AND DECLARE, that it shall be lawful for the said A. B., his executors or administrators, during the minority of my said daughter, and for the trustees or trustee for the time being of the firstly hereinbefore recited indenture of settlement, after the decease of my said daughter, and during the minority of any child or more remote issue of my said daughter, (but subject to any estate or interest of any surviving husband of my said daughter), at his or their discretion, to manage, repair, cultivate, and improve the said hereditaments, and to cut and sell timber thereon, With power to insure the buildings thereon from damage by fire, and to adjust and settle accounts with tenants, And to receive the rents and profits thereof; And, during the minority of my said daughter, to apply all or a competent part of the clear income arising from the said hereditaments in or towards the maintenance and education of my said daughter, And to invest the surplus (if any) of such income for her benefit in the public stocks or funds or on real securities in England or Wales, (and not in Ireland), With power from time to time to vary such investments and to resort to such accumulations at any time for the maintenance and education of my said daughter; And, after the decease of my said daughter, (but subject as aforesaid), to apply the clear income arising from the vested or presumptive estate or share or shares of each such her child or other issue in or of the said hereditaments and premises, under or by virtue of the uses and trusts hereinbefore limited and declared, in or towards the maintenance and education of such child or other issue, And to invest the surplus (if any) of such income in the public stocks or funds or on real securities in England or Wales, (and not in Ireland), to be held by such trustees or

—power to vary investments.

Authority to buy, &c., subject to special conditions.

Power to manage, insure, cut timber, &c.;

—to receive rents of copyholds;

—maintenance of tenant for life and of her issue;

trustee upon trusts corresponding as nearly as may be with the uses and trusts which for the time being shall affect the hereditaments or share from, out of, or in respect of which such surplus shall arise, but with power nevertheless to vary such investments, and to apply such accumulations in or towards the maintenance and education of the person or persons for the time being actually or presumptively entitled thereto. AND FURTHER, that it shall be lawful for the said trustees or trustee of the firstly hereinbefore recited indenture of settlement, by sale, mortgage, or otherwise, to convert and apply any part, not exceeding one-half, of the presumptive or vested share or shares of any grandchild or grandchildren or more remote issue of mine, in any of the hereditaments for the time being subject to the uses and trusts hereinbefore limited and declared, for his, her, or their advancement in the world; such conversions and applications to be made with the consent of my said daughter, or, after her decease, of any her surviving husband, and after the decease of my said daughter and such surviving husband (if any) at the discretion of such trustees or trustee. AND FURTHER, that it shall be lawful for such trustees or trustee, in their or his discretion, after the decease of my said daughter, and during the minority of any her child or more remote issue, entitled to any share of the hereditaments for the time being subject to the uses and trusts hereinbefore limited and declared, and with the consent in writing of such adult or competent person or persons (if any) as shall be entitled to any share in such hereditaments, to allot, by way of complete or partial partition, any part or parts of any of such hereditaments in severalty to any person or persons as and for the share or shares or part or parts of the share or shares of such person or persons; and for the purposes of such partition, and with or without the aid of a surveyor or surveyors, to determine the value of such allotment or allotments, and to make any provision for equality of partition, by charge upon or mortgage of any allotment or allotments. I GIVE AND BEQUEATH all such savings and arrears of pin-money or of other separate estate as may be in the hands of or be owing from any trustee for me at the time of my decease, unto my said husband and the said A. B., their executors, administrators, and assigns, IN TRUST for my two nieces, [*names*], in equal shares absolutely; And if either or both of them should die before me, then the share intended for each such niece so dying shall be held IN TRUST

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

—advancement.

Power to partition among devisees.

Bequest of savings of pin-money, &c., to two nieces; substitution of children in case of death, and cross gifts over.

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

for such her child or children as shall attain the age of twenty-one years, or die under that age leaving issue, and, if more than one, in equal shares, And if there should be no such child, then UPON THE TRUSTS herein declared concerning the other moiety of the said trust-monies; And if both my said nieces should die before me without leaving any such child, then UPON TRUST for [*name*], her executors or administrators.

Direction as to investment and maintenance.

I DIRECT my said husband and the said A. B., or the survivor of them, his executors or administrators, or their or his assigns, to invest the said trust-monies, or such part thereof (if any) as shall not be payable at my decease, in their or his names or name in the public stocks or funds, or on real securities in England or Wales, and not in Ireland, until the same are payable, and to apply the income therefrom towards the maintenance and education of the person or persons for the time being presumptively entitled to the capital from which such income shall arise, With power to apply not more than one-half of each such child's presumptive share for his or her advancement in life.

Appointment of guardian of daughter, with direction to apply to Court of Chancery for confirmation.

AND I HEREBY NOMINATE AND APPOINT my said husband, [*name*], and in case of his decease during the minority of my said daughter, the said [*name*], to be guardian of the person and of the real and personal property of my said daughter [*name*], during her minority; And if it should be thought necessary or expedient for the purpose of better investing my said husband, or the said A. B., with the authorities and powers of a guardian in respect of the person or property of my said daughter, I HEREBY DIRECT, that an application or applications shall be made to the Court of Chancery for the purpose of procuring a confirmation of the appointment hereby made, or an appointment in conformity thereto.

Appointment of executor.

AND, for the purpose of continuing the representation of or to the personal estate and effects of my said deceased husband, and for all other purposes whatsoever, I HEREBY NOMINATE AND APPOINT my said husband [*name*], in case he should survive me, and in case he should not survive me, or should die without having proved my will, then the said A. B., to be executor of this my will.

Trustees for the time being of marriage settlement to be trustees of will.

AND I DECLARE, that (except so far as is hereinbefore expressed or provided to the contrary) the trustees or trustee for the time being under or by virtue of the firstly hereinbefore recited indenture of settlement shall be the trustees or trustee for the time being of my will, And that the provisions in the said indenture contained for the retirement of trustees

and for the appointment of new trustees, shall extend and be applicable to the retirement of trustees and the appointment of new trustees under this my will. (*Trustees' receipts, indemnity, and expenses* (80 a^3), (80 a^4)). In witness, &c., *as in p.* 928.

3. APPOINTMENT OF REAL ESTATE BY MARRIED WOMAN.

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4. [Testamentary Appointment *of Freeholds, Copyholds, and Leaseholds to* Children *and their* Issue, *by a* Widow, *under a* Power *of* Selection *given to her by her Husband's Will.* Direction *to* convey *Real Estates to* Trustees, *upon various Trusts as to specific Estates, for the Benefit of individual Children and their Issue.* Powers *to Sons and Daughters to* appoint Life Interests *to* Widows *and* Surviving Husbands (*a*). Residue *to be* sold, *and the Proceeds divided among the Children attaining Twenty-one or leaving Issue. Substitution of Issue of Deceased Children. Powers of Letting, Selling, Exchanging, &c. Special Directions as to Powers of Trustees under Will of Testatrix's Deceased Husband.*

4. APPOINTMENT OF REALTY IN TRUST FOR CHILDREN, &c.

I, [*testatrix*], of ——, widow, hereby revoke all wills and testamentary instruments heretofore by me made, and declare this to be my last and only will and testament. Whereas my deceased husband, [*name*], by his last will and testament bearing date the —— day of ——, gave and devised all his freehold, copyhold, and leasehold messuages, lands, tenements, and hereditaments, unto and to the use of [*co-trustees*] and myself, their and my heirs, executors, administrators, and assigns respectively, In trust, that the said [*co-trustees*] and [*testatrix*], and the survivors and survivor of them, and the executors or administrators of such survivor, would permit the rents and profits of the said hereditaments

Recital of will of testatrix's husband, devising real estates to trustees in trust for testatrix for life, and then for his children or other issue, as she should appoint;

(*a*) [As to the execution of powers to appoint to children, &c., see Sugd. on Powers, chap. 15. Under a power to appoint to or in favour of children, or their issue, a limitation to a child for life, with a power to appoint a life interest to a surviving husband or wife, is clearly valid; and the appointment may be made to trustees, with the usual discretionary powers of selling, leasing, &c.]

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to be received by me during my life, and from and after my decease would be seised and possessed of the said hereditaments, upon such trusts, for the benefit of all and every or any one or more of his (the said testator's) children or other issue, in such shares, for such interests, and in such manner as I should by any deed or deeds, or by my last will and testament, or any testamentary writing, direct or appoint; and, in default of and subject to any such direction or appointment, upon certain trusts, for the benefit of his (the said testator's) children or their issue; AND WHEREAS the said testator departed this life on the —— day of ——, without having revoked or altered his said will, which was, on the —— day of ——, duly proved in the —— Court of ——, by his said devisees in trust, being also the executors and executrix in the said will named; AND WHEREAS the said testator had six children and no more, namely, [*names*]; AND WHEREAS the said [*one of the children*] departed this life on the —— day of ——, being then of the age of —— years, without having been married; AND WHEREAS I have not yet exercised the said power of appointment given to me by the above recited will. Now, in pursuance and exercise of the aforesaid power, and of every other power and authority me in this behalf enabling, I DO HEREBY DIRECT AND APPOINT that the said [*co-trustees*], or the survivor of them, or other the trustees or trustee for the time being of the above recited will, shall from and after my decease stand and be seised and possessed of all the freehold, copyhold, and leasehold hereditaments hereinafter mentioned and intended to be hereby appointed, or, in case any of them should have been sold or exchanged, then of the produce thereof, or the investments of such produce, or of the hereditaments which shall have been taken in exchange for the same, and of the monies (if any) which shall have been received therewith by way of equality of exchange, or the investments thereof, UPON TRUST, to convey, surrender, assign, transfer, or otherwise assure the same hereditaments, monies, investments, and premises, unto and to the use of, or so that the same may become vested in, [*trustees*], or the survivors or survivor of them, and their and his heirs, executors, and administrators respectively, according to the respective natures thereof, upon the trusts hereinafter declared. AND I DIRECT, that the said trust hereditaments, monies, securities, and premises, intended to be

—of testator's death and probate of his will;

—that testator had six children;

—death of one of them unmarried.

Testatrix appoints that her co-trustees shall convey the trust estates to other trustees.

Declaration of trusts.

hereby appointed, shall, from and after my decease, be held by the trustees or trustee for the time being thereof upon the trusts hereinafter declared, (that is to say), As to [*parcels*], with their actual and reputed appurtenances, In trust for the said [*eldest son*], and his assigns during his life, without impeachment of waste; and after his decease, Upon such trusts [as to any undivided part thereof not exceeding in the whole one equal undivided third part thereof, or as to any several part or parts thereof not exceeding in value one equal third part of the value of the whole thereof,] for the benefit of any widow of the said [*eldest son*], for the term of her life or for any shorter period, as he shall by deed or will appoint; And subject thereto, In trust for such child or children or other issue of the said [*eldest son*], in such shares, for such interests, and in such manner, as he shall by his last will and testament, or any testamentary writing, appoint, so that the benefit of every such appointment shall vest before the expiration of twenty-one years from the decease of the survivor of the said children of my said husband; And in default of and subject to any such appointment, In trust for such child or children of the said [*eldest son*] as shall attain the age of twenty-one years or die under that age leaving issue, and if more than one in equal shares, and his, her, or their respective heirs and assigns; Provided always, that no child of the said [*eldest son*], to whom or to whose issue any appointment shall be made, shall take under the foregoing limitation in default of appointment, unless he or she shall bring into distribution or allow for the benefit of such appointment; And, in case there should be no such child, then (subject to any such appointment as aforesaid) In trust for such child or children of the said testator, [*name*], as shall survive me and attain the age of twenty-one years or die under that age leaving issue, and such child or children of any child or children of the said testator dead at my decease, as shall survive me and attain the age of twenty-one years or die under that age leaving issue, in equal shares as between or among brothers and sisters, and his, her, or their respective heirs and assigns, but so that the child or the children collectively of a deceased child shall take only the share which such deceased child would have taken if living; And as to [*other parcels*], with their actual and reputed appurtenances, In trust for the said [*second son*], his heirs and assigns for ever; But in case

4. APPOINTMENT OF REALTY IN TRUST FOR CHILDREN, &c.

As to certain parcels in trust for eldest son for life;

—power for son to appoint a life estate in one-third to his widow;

—power to appoint to children or issue;

—in default of appointment, for son's children attaining twenty-one or leaving issue; substitution of issue of children dying before testatrix;

—hotchpot;

—in default of such issue, for children of testatrix attaining twenty-one or leaving issue;

—as to other parcels for second son in fee; if he die

4. APPOINTMENT OF REALTY IN TRUST FOR CHILDREN, &c.

before testatrix, for his children at twenty-one, &c.;

—if no child, for testatrix's children at twenty-one, &c.

Other parcels to second son for life, with power to appoint life interest to widow, and then for his children, &c.

Other parcels for eldest daughter, in fee, for her separate use; substitution of children.

Other parcels for eldest daughter for life.

Power to appoint life interest to husband.

Power to appoint to children or issue; in default, for children equally, &c.

Similar limitations of other parcels for the benefit of second and third daughters in moieties.

the said [*second son*] should die before me, then in trust for such child or children of the said [*second son*] as shall survive me and attain the age of twenty-one years or die under that age leaving issue, and if more than one in equal shares, and his, her, or their respective heirs and assigns; And in case the said [*second son*] should die before me or under the age of twenty-one years, and no child of the said [*second son*] should survive me and attain the age of twenty-one years or die under that age leaving issue, then IN TRUST (*for the children of the said testator, ut supra*); AND AS TO [*other parcels*], IN TRUST for the said [*second son*], and his assigns during his life, without impeachment of waste, (*remainder for his children, &c. ut supra*); AND AS TO [*other parcels*], IN TRUST for the said [*eldest daughter*], her heirs and assigns for ever, for her sole and separate use during any coverture; But in case the said [*eldest daughter*] should die before me, then (*trust for her children attaining twenty-one or leaving issue, or, if none, for the said testator's children, ut supra*); AND AS TO [*other parcels*], IN TRUST for the said [*eldest daughter*], and her assigns during her life, without impeachment of waste, and for her sole and separate use during any coverture; And after her decease, UPON SUCH TRUSTS, [as to any undivided part thereof not exceeding one-third part, or to any several part or parts thereof not exceeding in value one equal third part of the value of the whole thereof], for the benefit of any surviving husband of the said [*eldest daughter*], for the term of his life or for any shorter period, as she shall, notwithstanding coverture, by her last will and testament or any testamentary writing appoint; And subject thereto, IN TRUST for such child or children or other issue of the said [*eldest daughter*], in such shares, for such interests, and in such manner, as she shall, notwithstanding any coverture, by her last will and testament or any testamentary writing appoint, so that the benefit of every such appointment shall vest before the expiration of twenty-one years from the decease of the survivor of the said children of my said husband; AND in default of and subject to any such appointment, (*for children equally, ut supra*); AND AS TO [*other parcels*], IN TRUST for the said [*second and third daughters*], in equal shares, and their respective heirs and assigns for ever, and as to the share of each of them for her sole and separate use during any coverture; But in case either or both of them should die before me, as to the moiety of

each of them so dying, IN TRUST (*for her children equally, ut supra*); And in case she should die before me or under the age of twenty-one years, and no child of hers should survive me and attain the age of twenty-one years or die under that age leaving issue, then IN TRUST (*for the children of the said testator, ut supra*); AND AS TO [*other parcels*], IN TRUST as to one moiety thereof (*for second daughter for life, &c., ut supra; similar trusts of the other moiety for third daughter for life, &c.*); AND AS TO [*short description of residuary parcels*], and all other the freehold, copyhold, and leasehold hereditaments and estates so devised and bequeathed by the said testator, [*name*], as aforesaid, and not hereinbefore particularly mentioned and described, and also all such estate or interest, or estates or interests (if any), in any of the hereditaments and premises hereinbefore particularly mentioned and described and comprised in any limitation or limitations or trust or trusts hereinbefore contained or declared, or in any part or share or parts or shares of any of the last-mentioned lands, hereditaments, and premises, as shall not have been effectually and completely appointed and disposed of by any of the appointments and limitations hereinbefore contained, IN TRUST, that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, will (*a*), at such time or times as they or he, in their or his absolute discretion, shall think fit, sell and dispose of the said hereditaments, estates, and premises, either together or in parcels, and either at one time or at several times, by public auction or private contract, or by tender or valuation, or otherwise; And subject to any special or other conditions as to biddings, title, evidence, expenses, compensation, indemnity, security for purchase-money, or otherwise; With power to buy in or to rescind or vary any contract, and to resell, and generally, as to the time or times or manner of sale, or otherwise, to act in all respects as if they or he were absolutely and beneficially entitled to the said hereditaments, estates, and premises; And, after payment of all incidental

4. APPOINTMENT OF REALTY IN TRUST FOR CHILDREN, &c.

Residue of trust estates to be sold.

Investment.

(*a*) [It is conceived that the trust for sale would not render the real estate so directed to be sold liable to legacy duty under the will of the original testator. See, however, *Attorney-General* v. *Simcox*, 1 Exch. Rep. 749.]

4. APPOINTMENT OF REALTY IN TRUST FOR CHILDREN, &c.

costs and expenses, to invest the clear proceeds of such sale or sales in the names or name of my said trustees or trustee in the public stocks or funds, or on real securities in England or Wales (and not in Ireland); With power from time to time to vary such investments; And will be possessed of the said trust-monies and the investments thereof, IN TRUST for such of my said children, [*names*], as shall survive me and attain the age of twenty-one years, or die under that age leaving issue, and such child or children of any of my said children dying before me as shall survive me and attain the age of twenty-one years, or die under that age leaving issue, in equal shares as between or among brothers and sisters, but so that the child or the children collectively of any deceased child of mine shall take only the share which such deceased child would have taken if living. AND I HEREBY DECLARE, that, every female who shall take any estate, share, or interest in any real or personal property under or by virtue of this my will, or any codicil thereto, shall take the same for her sole and separate use during any coverture. AND I HEREBY DECLARE, that it shall be lawful for my said trustees or trustee, in their or his discretion, to delay the sale and conversion of all or any part of the said hereditaments, estates, and premises hereinbefore directed to be sold, until they or he shall deem it expedient to convert the same; and that, in the meantime, the income to arise from the same shall be held, applied, and disposed of upon the trusts and in the manner upon and in which the income from the proceeds of the sale and conversion thereof would have been held and applicable under the trusts herein declared. AND I FURTHER DECLARE, that it shall be lawful for my said trustees or trustee, at any time or times, and from time to time, at their or his discretion, (but as to any lands, tenements, or hereditaments, to or in which, or to or in any undivided share of which any person or persons, of full age and competent mind, shall for the time being be beneficially entitled for life or for any greater estate, not without the consent in writing of such person or persons), to lease or join in any lease or leases of all or any of the hereditaments comprised in or subject to any appointment or trusts hereby made or declared; such lease or leases to be made for any absolute term or terms of years in possession, not exceeding twenty-one years, at a rack-rent, or for building, repairing, improving, or mining purposes, for

Proceeds of sale in trust for such children and issue of deceased children as shall attain twenty-one or leave issue.

Females to take for separate use.

Power to delay sale.

Power to trustees to grant husbandry, mining, building, repairing, or improving leases.

4. APPOINTMENT OF REALTY IN TRUST FOR CHILDREN, &c.

such term or terms, for such considerations by way of premium, rent, or otherwise, and upon such conditions as they or he shall think fit; AND ALSO (*powers to partition, exchange, sell, &c.* (73 *k*[2]) *to* (73 *k*[7]); *to partition among appointees in common* (75 *a*); *to manage and apply rents of actual or presumptive shares for maintenance, and to advance* (75 *f*); *trustee clauses* (80 *a*)). AND I FURTHER DIRECT AND DECLARE, that all the powers of letting, selling, exchanging, and joining in any partition of the said hereditaments, estates, and premises intended to be hereby appointed, and of investing the proceeds thereof, and of purchasing other hereditaments, and also all the powers of applying the income and capital respectively of the vested or presumptive portions or shares of children or their issue, in or towards their maintenance, education, and advancement; and also the powers of changing or appointing new trustees and of giving receipts and discharges; and also the declaration of indemnity in the above recited will of the said [*name*], deceased, respectively contained and conferred upon or made in favour of the trustees therein named, shall and may extend and be exercisable by and applicable to the trustees or trustee for the time being of this my will, or (so far as the same powers, or the corresponding or equivalent powers hereinbefore expressed to be hereby given to or conferred upon the trustees or trustee of this my will, shall or may not be lawfully exercisable by such trustees or trustee therein,) by the trustees or trustee for the time being of the said will of the said [*name*], deceased, so as such power be exercised in conformity with and for the purpose of carrying into execution and furthering and effectuating the trusts, purposes, and objects of this my will; PROVIDED ALWAYS, that no power which by the above-mentioned will is required to be exercised with my consent while living, (except the said power of appointing new trustees), shall be exercised in respect of any part or share of the said trust-estates and premises whereof there shall for the time being be in execution a tenant for life, of full age and competent mind, without the consent of such tenant for life. IN WITNESS, &c.

Power to partition, exchange, sell, &c.

Trustee clauses.

Adoption of powers contained in will of deceased husband.

Consent to execution of powers.

5. WILL OF MARRIED WOMAN, APPOINTING COPYHOLDS, BEQUEATHING SEPARATE ESTATE, &c.

5. [WILL *of a* MARRIED WOMAN, *disposing of* COPYHOLDS *surrendered to such Uses as she shall appoint; exercising a* POWER *of* APPOINTING *a* LIFE INTEREST *in Trust Funds to her* HUSBAND, *and a Power of* SELECTION *in favour of her* CHILDREN *and more remote Issue, (given her by her Father's Will); and disposing of her* SEPARATE *Personal* ESTATE *and* SAVINGS (*a*).

Appointment of trustees.

THIS IS THE LAST AND ONLY WILL of me, [*testatrix*], the wife of [*husband*], of &c. I APPOINT [*trustees*] to be executors and trustees of my will. IN EXERCISE of a power reserved to me by a certain customary surrender, made after my marriage, and of all other powers thereto enabling me, I APPOINT that all the copyhold hereditaments in the county of ——, over which I have any power of disposition, shall, after my decease, be and remain To SUCH USES as my trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, or other my trustees or trustee for the time being, shall at any time or times before the expiration of twenty-one years from the decease of such survivor, by deed appoint; AND, subject thereto, and charged with the payment of the sum of £—— to my trustees or trustee for the time being, at such time or times as the same may be required under the trusts hereinafter declared, with interest on the said sum of £——, from the time of my decease, after the rate of —*l.* per centum per annum, by equal quarterly payments, To THE USE of my husband and his assigns, during his life; With remainder To SUCH USES as my eldest son [*name*] shall by any deed or deeds appoint; AND, subject thereto, To THE USE of my said son, his heirs and assigns; or, if he should die before me, To THE USE of such his child or children as shall be living at my decease, (if more than one, in equal shares), and his, her, or their heirs and assigns; AND, if there be no such child, To THE USE of my second son, [*name*], his heirs and assigns; or, if he should die before me, To THE USE of such his child or children, &c. I DECLARE, that the said power of appointment hereinbefore given to my trustees or trustee is given to them or him upon trust for better enabling them or him to recover

Appointment of copyholds to such uses as trustees shall appoint; in default, to husband for life;

—remainder to eldest son or his issue;

—on failure of such devise, to second son or his issue.

Trustees to raise out of copyhold £—— and interest, to be

(*a*) [See *Johnstone* v. *Lumb*, 15 Sim. 308.]

5. WILL OF MARRIED WOMAN APPOINTING COPYHOLDS, BEQUEATHING SEPARATE ESTATE, &c.

the said sum of £—— and interest; For which purpose I authorise them or him at any time or times to mortgage or sell the said lands, together or in parcels, with power to give to any mortgagee any power of sale or other usual or expedient powers, and to sell subject to any special conditions as to title or otherwise, and to buy in any hereditaments at any sale, and to rescind or vary the terms of any contract relating to any hereditaments, and to resell the same. I DECLARE, that my trustees or trustee shall be possessed of the said sum of £——, and the interest thereon, upon the trusts hereinafter declared concerning the residue of my separate personal estate. I GIVE to my sister, [*name*], or, if she be dead at my decease, unto my niece, [*name*], all my books, dressing-cases, watches, jewelry, trinkets, and articles of personal ornament. I GIVE to my servant, [*name*], if she should be in my service at my decease, all my wearing apparel. I GIVE the residue of my personal estate to my said trustees or trustee, UPON TRUST that they or he will convert into money, and invest in the funds or on real securities in England or Wales, such parts thereof as shall not be already so invested; and also, the said sum of £——, or such part or parts thereof as from time to time shall come to their or his hands and not be immediately otherwise applicable; With power from time to time to vary the investments of all or any part of the said trust property. (*Annuities, legacies, and trusts of residue*). IN EXERCISE of the power given me by my father's will, I direct that the trustees or trustee for the time being under such will shall pay the income from the trust-funds therein comprised and subjected to my appointment, unto my present (*a*) husband or his assigns, during his life; AND, after his decease, shall transfer the said trust-funds unto such child or children of mine [other than my said son, [*name*]] as shall attain the age of twenty-one years or marry; if more than one, in equal shares; (*add, if authorised, substitutionary gift to issue of deceased children* (57 *k*)); AND, if there should be no such child, shall transfer the said trust-funds unto my present husband, his executors, administrators, or assigns. (*General provisions for maintenance and advancement* (59 *c*[1]), &c. *Trustee clauses*, (80 *a*[1]), &c.). IN WITNESS, &c.

held upon trusts of residuary separate estate.

Power to mortgage or sell.

Specific bequests of books, trinkets, &c., with substitution in case of lapse.

Residuary personalty to be invested.

Appointment under power in father's will of income of personalty to husband for life; capital to children [except eldest son] in equal shares; in default of children, to husband absolutely.

(*a*) [So far as it affects property which would not go to the heir or personal representative of the testatrix, in default of appointment, the will would not be revoked by a subsequent marriage. Stat. 7 Will. 4 & 1 Vict. c. 26, s. 18.]

6. WILL IN FAVOUR OF ONE PERSON.

6. WILL *giving entire* REAL *and* PERSONAL ESTATE *in favour of an* ONLY CHILD.

COMMENCEMENT, (1 *a*). Appointment of an executor, (3 *a*). Direction as to funeral, (4). Devise of freeholds and copyholds (including trust and mortgage estates) to such uses as son shall appoint; in default, to him in fee, (69 a^1), (69 a^2). Bequest of personalty to son, (46 a^1). Testimonium and attestation, (*p.* 928).

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7. PERSONALTY IN FAVOUR OF WIFE AND CHILDREN.

7. WILL *disposing of* RESIDUARY PERSONAL ESTATE *in favour of the* TESTATOR'S WIFE *and* CHILDREN.

COMMENCEMENT, (1 *a*). Appointment of executors and guardians, (3 *h*) *or* (3 *k*). Immediate legacy and furniture, &c., to wife, (8 *f*). Annuity to testator's mother, (19 *k*) *or* (20 *b*). Pecuniary legacies to children, to be invested; and provisions for maintenance and advancement, (38 *d*). Legacies to executors, to servants, &c., (27 *a*), (29 *b*), &c. Residuary bequest in trust for conversion and investment, with discretionary powers, (48 c^1), &c. Authority to delay conversion, and declaration as to income, (48 *q*). Devise of trust estates, (68 *c*). Declaration of trusts, (52 *u*); for wife during widowhood, and then for children; maintenance and advancement clauses, (55 a^1) *or* (55 c^1). Provision for wife to be in lieu of dower, (78 *b*). Power to appoint trustees, receipt clause, and indemnities to trustees, (80 c^1), &c. Testimonium and attestation (*p.* 928).

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8. VARIOUS TRUSTS FOR CHILDREN.

8. WILL *of a* WIDOWER *whose Children are adult, containing Devise of* COPYHOLD *Estate* IN MORTGAGE *and various specific and pecuniary Bequests. Residuary* REAL *Estate to be converted, and the Produce divided into four Shares for benefit of Two Sons and Two married Daughters. Provision against* IMPROVIDENCE *of younger Son.*

COMMENCEMENT, (1 *a*). Appointment of executors and trustees, (3 *f*). Specific bequests, (7 *a*), &c. Household

furniture to be divided among children, (13 *b*). Devise of copyhold estate in mortgage to elder son, cum onere, (69 *m*). Bequest to daughter of debt owing on her husband's bond, (17 *a*). Leaseholds to trustees for sisters for life and then for younger daughter, (77 *a*). Mortgage debt to grandson, (16 *e*). Pecuniary legacies to nephews and nieces, the latter for their separate use, (40 *b*). Direction as to time for paying legacies, (61 *b*). Legacies free of duty, (63 *d*). Bequest of stock in the funds to trustees in trust for infant nephew, (14 *d*). Direction to purchase annuity for servant, (19 *b*). Residuary devise and bequest in trust for conversion, &c. (52 c^1) *to* (52 d^5). Authority to suspend conversion, (53 b^1), &c. Declaration of trusts of residue, (52 *u*); one-fourth for elder son absolutely; another for younger son for life, determinable on alienation, bankruptcy, &c., and then for his wife and children; the other two-fourths for daughter and her issue, with usual directions, (56 c^1), &c. Devise of trust estates, (68 *c*). Receipt clause, (79 *a*). Trustee clauses, (80 c^1), &c. In witness, &c.

8. various trusts for children.

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9. WILL *of a* Trader, *a married Man. Directions for carrying on* Trade.

9. directions for carrying on trade.

Commencement, (1 *a*). Appointment of wife and others executors, trustees, and guardians, (3 *i*). Specific bequests, (7 *a*), &c. Use of furniture, &c. to wife for life, (9 *b*). Directions for carrying on business, and for its being taken to by testator's son, (49 c^1), &c. Conversion and investment of residue, (48 c^3), &c. Trusts of residue for wife for life for maintenance of herself and children, (55 d^1) *to* (59 d^3). Proviso explanatory of trust for maintenance, (59 *f*). Maintenance after wife's death, (55 d^4). Advancement, (55 d^5). Devise of trust estates, (68 *c*). Receipt clause, (79 *a*). Trustee clauses, (80 c^1), &c. In witness, &c.

10. PRODUCE OF REAL AND PERSONAL ESTATES FOR WIFE AND CHILDREN.

10. WILL *devising* REAL ESTATE *in trust for* SALE (*a*), *the Produce to be invested with the personal Estate for the* WIFE AND CHILDREN. LIFE INTEREST IN ONE MOIETY *to the* WIFE. *Capital to Children in* UNEQUAL SHARES. *Daughters' Shares settled, with cross Limitations.* LIFE ANNUITIES *to Sister and Niece determinable on Alienation.*

COMMENCEMENT, (1 *a*). Appointment of executors and guardians, (3 *i*). Legacies to trustees and to wife, (26 *d*). Realty to trustees for sale, (52 *d*[1]) *to* (52 *d*[8]), *omitting* (52 *d*[5]). Furniture to wife, (8 *e*) *or* (8 *k*). Annuities to sister and niece, (19 *l*). Residuary personalty to trustees for conversion, (48 *c*[1]) *to* (48 *c*[5]). Authority to postpone conversion, (53 *c*). Produce of realty and personalty to be invested, (52 *a*[6]), (52 *a*[7]), (52 *a*[12]). Income of one moiety to wife during widowhood; Subject thereto, the entirety for children, sons at twenty-five, daughters at twenty-one or marrige; Sons' shares double those of daughters; Substitution of issue of children dying before the vesting age; On failure of children, the remaining moiety to wife for life, and, subject thereto, to testator's niece for her life, and then to her children; Maintenance and advancement; Share of each daughter to be in trust for her separate and inalienable use for life, and then for her children; Accruer; Maintenance and advancement; Power to daughters to bequeath life interests to husbands, (55 *e*[1]), &c. Power to invest trust-monies in purchase of lands, (48 *r*[1]), &c. Power to lease purchased land, (73 *a*). Devise of trust and mortgage estates, (68 *c*). Trustee clauses, (80 *a*[1]), &c. (*See* (80 *k*[1])). IN WITNESS, &c.

(*a*) [A discretionary power for sale of real estate is, for the reasons mentioned in p. 612, generally preferable to an absolute direction to sell. See the form (52 *f*[1]), &c.]

11. WILL OF A FARMER.—FARMING BUSINESS *to be carried on* DURING SON'S MINORITY. *Maintenance of Wife and Son out of Profits. After Business is put off, Wife to have a* RENT-CHARGE. *Rent-charge for separate Use of Married Sister.* LEGACY SETTLED ON *Step Daughter and her Children.* RESIDUE *for* SON, *or, if he die under Age and without Issue, one-fourth to Widow, and Remainder for three married Nieces for life and their Children.*

11. FARMING BUSINESS AND STOCK.

COMMENCEMENT, (1 *a*). Appointment of executors and trustees, and guardians of son, (3 *f*), (3 *j*). Legacy to trustees to be invested, (43 a^1) *to* (43 a^4), *or* (43 b^1), (43 b^2). In trust for step-daughter for separate and inalienable use for life; Power to appoint by will, and to raise £—— for her husband, (56 *b*). Immediate legacy to wife, (26 *a*). Rent-charge to wife during widowhood, to commence when farming business is given up, (24 a^1), (24 a^2). Legacy to niece for her separate use, (32 *d*). Rent-charge to trustees for sister, (24 a^3), (24 a^4). Realty, furniture, stock, &c. to trustees, in trust to carry on farming business during son's minority; Wife to assist; Maintenance of wife and son out of surplus profits; Real estate and stock to be in trust for son if he attain twenty-one or leave issue, if not, to be sold and invested; Trustees may discontinue business, assign and let farms, and mortgage for payment of debts and legacies; Provisions in case of sale or mortgage while annuitants are living, &c., (54 b^1), &c. Power to pay maintenance to guardians, (59 *d*). Personalty in trust for conversion, (48 c^1), &c. Trust for son attaining twenty-one or leaving issue; Maintenance and advancement; Substitution of son's children if he die before testator; If he die under twenty-one without issue, one-fourth for testator's wife, and the remainder for his three nieces for life and their children; Maintenance; Accruer; Ultimate trust for survivor of nieces, (56 a^1), &c. Provision for wife to be in lieu of dower, (78 *a*) *or* (78 *b*). Devise of trust and mortgage estates, (68 *c*). Power to appoint new trustees, (80 a^1). Power to appoint new trustees of rent-charge, (80 h^4). Indemnity to trustees, (80 a^4). IN WITNESS, &c.

12. REALTY, &c., IN TRUST FOR CHILDREN AND GRAND-CHILDREN.

12. WILL OF A WIDOWER.—SPECIFIC DEVISE *in trust for* THREE SONS *for Life, with equitable* REMAINDERS IN FEE *to their* CHILDREN. *Similar Devise in trust for two Daughters and their Children. Cross* LIMITATIONS. *Specific Devise to Grandson. Residuary Personalty for Children equally.*

COMMENCEMENT, (1 *a*). Appointment of executors, (3 *c*). Specific bequests, (*see* (7 *a*) *et seq.*). Farm to trustees in trust for three sons for life, remainder to their children attaining twenty-one or leaving issue, (71 *n*); [*add*, "BUT in case [*name*], the present wife of my said son, [*name*], should survive him, then I DIRECT my said trustees or trustee immediately after my said son's decease, whether he leave issue or not, out of his third or other share of the said trust-premises, to pay to the said [*wife*] an annuity of £—— during her life, by quarterly payments, clear of legacy duty and all other deductions, to commence from my said son's decease, and be made good by apportionment, if necessary, to his said widow's decease."] Devise in trust for two daughters for life, then for their children attaining twenty-one or leaving issue, except grandson; Specific devise to grandson in fee; Maintenance, (71 *o*[1]), &c. Personalty to be converted and divided among children; Investment and maintenance, (48 *c*[1]) *to* (48 *c*[7]), (55 *f*[1]), &c. Power to trustees to lease, (73 *d*). Devise of trust and mortgage estate, (68 *c*). Trustee clauses, (80 *a*[1]), &c. IN WITNESS, &c.

Annuity to present wife of one son, if she survive him.

13. PERSONALTY: LEGACY FOR DAUGHTER AND CHILDREN.

13. WILL *of* PERSONALTY.—*Legacy to be invested for an* ONLY [*married*] DAUGHTER *and her Husband successively for Life, and then for Daughter's Children.* RESIDUE *to Testator's* WIFE.

COMMENCEMENT, (1 *a*). Appointment of executors, (3 *c*). Bequest of stock, to be appropriated or purchased, in trust for daughter's separate use for life, then for husband, and then for children; Power of appointment in default of

children, (43 *i*). Maintenance and advancement, (43 *a*[12]), (43 *a*[13]). (*There is no power to vary investments. If the testator had intended to give such a power, he would have bequeathed a sum of money to be invested.*) Residue of personalty and trust and mortgage estates to wife, (46 *b*), (68 *b*). Trustee clauses, (80 *a*[1]), &c.; *see* (80 *b*[9]). In witness &c.

13. PERSONALTY: LEGACY FOR DAUGHTER AND CHILDREN.

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14. WILL *devising* Part *of* Real Estates *to* Wife *for* Life; *subject thereto, the whole to* Son *in* Fee. Legacy *to* Wife *for* Life; *then for* Children, *subject to* Power *of* Selection. *Legacies in Trust.* Coal and Iron Works *to be* carried on *for a stated Period. Son to be admitted into the Concern on his Majority. Profits and Residue of Personalty to be invested in trust* (*subject to* Annuity *to* Widow) *for* Son and Daughters *for their* Lives, *and then to their* Children.

14. COAL WORKS, &c.

Commencement, (1 *a*). Appointment of executors and trustees and guardians, (3 *k*). Devise of trust and mortgage estates, (68 *c*). Of real estates, as to dwelling-house, &c., to wife for life; Subject thereto, all to son, with power of appointment; Power to trustees to apply rents for maintenance, (71 *p*[1]), &c. Furniture to wife, (8 *e*). Legacy to be invested in trust for wife for life; Then for children, subject to power of selection, (43 *c*[1]), &c. Legacies to children; Provisions for maintenance, &c., (38 *a*), (38 *b*), *or* (38 *e*), *or* (38 *f*). Legacy in trust for separate use of sister, (32 *e*), *or* (44). Legacies to clerks, (29 *a*). Bequest of coal and iron works and personalty to trustees in trust to raise money for payment of debts and legacies, to invest surplus, carry on works, &c.; Power to admit son; Ultimate conversion and investment, (49 *f*[1]), &c. Trusts; Annuity to wife; Residue for son and daughters for their lives, and then to their children per stirpes; Accruer; On failure of such issue, gift over to brother and his children; Maintenance, &c. (56 *e*[1]). Trustee clauses, (80 *a*[1]), &c. In witness &c.

15. CONVERSION OF REALTY AND PERSONALTY FOR CHILDREN, &c.

15. WILL *of a* WIDOWER. SPECIFIC *Bequest of* LEASEHOLDS, *with* LIMITED EXECUTORSHIP. RESIDUE *of* REALTY *and* PERSONALTY *for* CONVERSION. LEGACIES *of* STOCK *in trust for* TWO SONS *for* LIFE, DETERMINABLE ON ALIENATION; *then for* CHILDREN, *subject as to One Legacy to a trust for Son's Wife for Life. Power to other Son to appoint Life Interest to Wife.* ONE MOIETY *of* RESIDUE *to another* SON *absolutely, with substitution of his Wife and* CHILDREN *in case of his Death. The other Moiety for* DAUGHTER *for* LIFE, *her* HUSBAND *and* CHILDREN.

COMMENCEMENT, (1 *a*). Bequest of leaseholds to son, with limited executorship and appointment of general executors, (3 *q*). Residuary devise and bequest in trust for conversion, (52 e^1), &c. Legacies, (*see* pp. 502 *et seq.*) Sum of stock to be appropriated for benefit of sons for life, &c., as above, (43 l^1), &c. Declaration as to legacy duty, (63 *a*). Trusts of residue, as above, (56 f^1), &c. Maintenance and advancement, (56 g^{30}), (56 g^{31}). Devise of mortgage and trust estates, (68 *c*). Trustee clauses, (80 a^1), &c.; *see* (80 h^5). IN WITNESS &c.

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16. PERSONALTY TO WIFE.

16. WILL *bequeathing entire* PERSONAL ESTATE *to* WIFE, *with* RECOMMENDATION *in favour of* RELATIONS.

COMMENCEMENT, (1 *a*). Appointment of executrix, (3 *b*). Bequest of personalty, with recommendation, (46 *g*). Devise of trust and mortgage estates, (68 *b*). IN WITNESS &c.

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17. WIFE AND CHILDREN.

17. WILL *in favour of* WIFE, SON, *and* DAUGHTERS. *Residuary* PERSONALTY (*except Stock in the Funds*) *to* WIFE. REALTY *to be converted. The* BULK *of the Property given in* LEGACIES *for the benefit of* CHILDREN, *&c.* ANNUITIES *to* MOTHER *and* SISTER.

COMMENCEMENT, (1 *a*). Executors and guardians, (3 *i*). Personalty (except stock in the funds) to wife, clear of debts and legacies, (11). Legacy to son at twenty-two; In-

terest for maintenance ; Further legacy at twenty-four, after death or marriage of wife, (35). Legacies to daughters; Payment deferred during wife's widowhood; Power of advancement on marriage; Power to settle a moiety of each daughter's legacy on marriage, (38 *i*). Legacy to brother, to be paid within six months, (32 *c*). Legacies to trustees, (27 *c*). Real estate for conversion, (52 d^1) *to* (52 d^7), *omitting* (52 d^5). Stock in the funds, &c. to trustees, (14 *a*). Trusts of investments of realty and bequeathed stock,—to pay annuities to mother and sister; Residue to wife during widowhood; Then to raise the other legacies; Also a legacy for married daughter for her separate use; Then for her children; Maintenance; £—— for children, as widow shall appoint; In default, and as to residue also, to children equally; Provisions in case funds are insufficient to raise all the legacies in full; Authority to purchase annuities; Provision for wife to be for maintenance of herself and children, (21 a^1), &c. Power to vary investments, (60 a^1). Devise of trust and mortgage estates, (68 *c*). Trustee clauses, (80 a^1), &c. In witness &c.

17. WIFE AND CHILDREN.

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18. REAL ESTATE *in* STRICT SETTLEMENT. *Usual Clauses. Legacies to Daughters and younger Sons.* RESIDUE *to* CHILDREN *generally.* POWER *to raise* DEBTS *and* LEGACIES *by* MORTGAGE *of* REALTY.

18. STRICT SETTLEMENT, (CONCISE).

COMMENCEMENT, (1 *a*). Appointment of executors, &c. (3 *k*). Devise of trust and mortgage estates, (68 *c*). Devise of realty to first and other sons and their issue male in strict settlement; Remainder to daughters concurrently and their issue male in strict settlement, with cross remainders; Remainder to testator's children concurrently in tail general, with cross remainders; Tenants in tail born in testator's lifetime made tenants for life; Maintenance and accumulation; Powers to charge jointures and portions, (72 a^1), &c. Powers to lease, (73 *e*), (73 *f*). To sell, exchange, &c. (74 a^1), &c. Specific and pecuniary legacies; Legacies to daughters on marriage; Power for daughters dying unmarried to bequeath £—— by will, and clause of accruer; Interest for maintenance, (38 l^1). Legacies to younger sons, (38 *b*). Power to mortgage realty for debts and legacies, (70 *e*). Trustee clauses, (80 a^1), &c. In witness &c.

19. STRICT SETTLEMENT: RENEWABLE LEASEHOLDS: ACCUMULATIONS.

19. WILL *of a* LANDED PROPRIETOR. *Bequest of* RENEWABLE LEASEHOLDS *with Provisions for Renewal. Accumulation of Rents.* FREEHOLDS *and* COPYHOLDS *in* STRICT SETTLEMENT.

COMMENCEMENT, (1 *a*). Appointment of trustees, (3 *f*). Of guardians, (3 *m*). Specific legacies, (7 *a*), &c. Pecuniary legacies, (29 *a*), &c. Bequest of renewable leaseholds to trustees upon trusts to renew, &c.; In trust for son at twenty-one; If no son, for daughter; If no daughter, for wife; Accumulation of rents during minority; Power to sell, &c., (77 c^1), &c. Devise of freeholds (subject to rentcharge to wife) in strict settlement; Maintenance and accumulation clauses; Jointuring, and other powers, (72 b^1), &c. Wife to give up interest under marriage settlement, (78 *c*). Residuary bequest in trust for conversion and investment, (48 a^1), &c. Trusts of residuary personalty for all children except eldest son or child taking the real estates, (55 l^1), &c. Receipt clause, (79 *a*). Trustee clauses, (80 *f*), (80 *g*), (80 k^1), (80 l^1), (80 l^2). IN WITNESS &c.

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20. STRICT SETTLEMENT: SHIFTING CLAUSES.

20. STRICT SETTLEMENT *of* TWO ESTATES *on Testator's* TWO DAUGHTERS *respectively and their Issue, with cross Remainders, and ultimate Remainder to a Niece and her Issue.* NAME *and* ARMS CLAUSE, *and* SHIFTING LIMITATIONS. *Appointment of* PROTECTORS. TERM *for* RAISING *Money for* DEBTS *and* LEGACIES. HEIRLOOMS.

COMMENCEMENT, (1 *b*). Devise of estate in the county of York to trustees for a term, to raise debts and legacies; And subject thereto, to elder daughter for life; Remainder to her sons successively in tail male; Remainder to her sons in tail general; Remainder to her daughters in tail male; Remainder to her daughters in tail general; Remainder to second daughter and her issue in strict settlement; Similar devise of Lincolnshire estates to second daughter and her issue in strict settlement; Remainder to niece and her issue in strict settle-

ment; Power to daughters and niece to appoint rent-charges to husbands; Clause reducing estates tail of persons born in testator's lifetime to estates for life; Name and arms clause; Proviso for shifting Lincolnshire and Yorkshire estates if they become united; Leasing powers, &c.; Appointment of protectors; Power to appoint new protectors; Furniture, &c. as heirlooms, (72 c^1), &c. Residue of personalty to daughters equally, (46 f). Appointment of executors and trustees, (3 f). Devise of trust and mortgage estates, (68 c). Trustee clauses, (80 a^1), &c. IN WITNESS &c.

20. STRICT SETTLEMENT: SHIFTING CLAUSES.

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21. WILL *of Realty and Personalty. Town House for Wife's Residence.* REALTY *to* SONS *successively in* STRICT SETTLEMENT. HEIRLOOMS. LEGACIES *to* CHILDREN *and their* ISSUE. RESIDUE *of* PERSONALTY *for* WIFE, *and then for* ISSUE *as she shall appoint; in default, equally. Power to* SETTLE PART *of Daughter's Legacies.*

21. REALTY AND PERSONALTY: WIFE AND CHILDREN.

COMMENCEMENT, (1 a). Appointment of executors and guardians, (3 i). Immediate legacy and furniture, &c. to wife, (8 f). Bequest of leasehold house in trust for wife's residence; Subject thereto, to be sold, (77 b). Real estate for first and other sons in strict settlement; In default of such issue, to be sold for benefit of daughters or their issue; Maintenance; Power to lease, (72 d^1), &c. Furniture as heirlooms, (72 c^{19}). Legacy in trust for married daughter's separate and inalienable use, and then for her children for life; Power of selection; Maintenance, (43 b^1), &c. Legacy among other children equally; Shares of minors to be invested; Maintenance; Substitution of issue of deceased children; Power to settle legacies of daughters marrying under age, (38 h^1), &c. Residue of personalty for conversion and investment, (48 c^1), &c. Trust for wife for life, and then for surviving children or grandchildren, with power of selection; In default of issue, as wife shall appoint; Discretionary powers as to maintenance, &c., (55 b^1), &c. Devise of trust and mortgage estates, (68 c). Trustee clauses, (80 a^1), &c. IN WITNESS &c.

22. ONLY SON AND HIS ISSUE, IN STRICT SETTLEMENT.

22. WILL *devising* REALTY *to an only* SON *and his Issue in* STRICT SETTLEMENT.

COMMENCEMENT, (1 *a*). Devise of realty to son and his issue in strict settlement; Power to charge jointures and portions; Power to son, in case of death without issue, to charge estates with a sum by will; Usual powers, (72 *e* [1]), &c. Personalty to son, (46 *a* [1]). Devise of trust and mortgage estates to him, (46 *a* [2]). Appointment of son executor, (3 *a*). Trustee clauses, (80 *a* [1]), &c. IN WITNESS &c.

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23. ORDINARY WILL OF REALTY AND PERSONALTY.

23. WILL *bequeathing Specific and Pecuniary Legacies. Residue for Conversion.* ANNUITY *to* WIFE *during Widowhood.* RESIDUE *for* CHILDREN: *Sons' Shares to vest at Twenty-five. A* MOIETY *of each* DAUGHTER'S SHARE *for her* SEPARATE USE *for* LIFE, *and then for her* CHILDREN. *Variation by which the* VESTING *of* GRANDSONS' SHARES *is postponed until* TWENTY-FIVE. PROVISION *for* ILLEGITIMATE CHILD.

COMMENCEMENT, (1 *a*). Appointment of executors and guardians, (3 *c*), (3 *n*). Furniture of a certain value to wife, (8 *k*). Immediate legacy to wife; Legacies to children, including a natural daughter, (38 *f*). Investment and maintenance, (38 *g* [1]). Substitution of issue of deceased children, (38 *g* [2]). Legacies to be paid according to their numerical order, (61 *e*). Recital of contract for purchase of an estate; Discretionary power to relinquish or complete it, (69 *e*). Realty and personalty for conversion and investment, (52 *e* [1]), &c. Fund to be set apart for annuity for wife, reducible on marriage, (20 *a*). Residue in trust for children, sons at twenty-five, daughters at twenty-one or marriage; Maintenance; One moiety of daughters' shares to be settled on them and their issue; Conditional postponement of vesting of grandsons' shares until twenty-five, (55 *g* [1]), &c. Power to suspend sale of residue and postpone payment of legacies, (53 *b* [1]), &c., (53 *k*). Devise of trust and mortgage estates, (68 *c*). Trustee clauses, (80 *a* [1]), &c. IN WITNESS &c.

24. WILL *in favour of Wife and Children.* ANNUITY *to* WIFE *during* WIDOWHOOD. RESIDUE *of* REALTY *and* PERSONALTY (*subject to Power of Selection in Widow over* £——) *in trust for* CHILDREN. *Shares of Sons* MARRYING *in Testator's lifetime or afterwards,* WITHOUT CONSENT, *given to their* WIDOWS *and* CHILDREN. *Similar Restrictions as to Daughters. Children born after a Marriage supposed to be Invalid, admitted.*

24. WIFE AND CHILDREN: SPECIAL RESTRICTED TRUSTS.

COMMENCEMENT, (1 *a*). Appointment of executors and trustees and guardians, (3 *c*), (3 *n*). Furniture, &c. to wife, (8 *f*). Legacies, (*see* p. 502). Residue for conversion, (52 *c* [1]), &c. Annuity to wife during widowhood, (19 *o*). Legacy of £—— for testator's issue, as wife shall appoint; Residue for children or their issue at twenty-four or on marriage; Share of a son marrying without consent, and dying under twenty-four, in trust for his widow for life, (subject to control by his will), and then for his children, &c. Similar provisions as to daughters; Maintenance, &c., (55 *m* [1]), &c. Advancements by testator to be deducted, (64 *a*). Ultimate gift in default of issue to wife, if living and unmarried, if not, to sister, (56 *m*). Children supposed to be illegitimate to share with other children, (66). Devise of trust and mortgage estates, (68 *c*). Trustee clauses, (80 *a* [1]), &c. IN WITNESS &c.

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25. WILL *devising* REAL ESTATES *in trust to pay* ANNUITIES *to* SONS (*to cease on Alienation*), *and to* ACCUMULATE *Residue of* INCOME *for Twenty-one Years; subject thereto, for a period of Twenty-one Years from Death of Survivor of certain Lives, to permit Rents to be received in the order of a* STRICT SETTLEMENT. *Ultimate Gift to Person then answering the description of Testator's Heir male. Personalty to be laid out in Land, to be settled in like manner.*

25. ACCUMULATION AND REMOTE VESTING.

COMMENCEMENT, (1 *a*). Appointment of executors, (3 *c*). Realty to trustees, in trust to pay annuities to sons and accumulate residue of income; When accumulation ceases,

25. ACCUMULATION AND REMOTE VESTING.

rents to go in the order of a strict settlement; Vesting of corpus postponed to the utmost limit, when it is given to testator's heir male; Personalty to be laid out in land; Discretionary powers; Special trustee clauses, (72 *g*[1]), &c. IN WITNESS &c.

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26. SOLICITOR'S SHARE IN PARTNERSHIP, &c.

26. WILL *of a* SOLICITOR. *Various* TRUSTS *for* CHILDREN. INTEREST *in* PARTNERSHIP BUSINESS, *Law Books, Papers, &c. bequeathed to a Son, (a Partner).*

COMMENCEMENT, (1 *a*). Appointment of executors and guardians, (3 *l*). Immediate legacy and life interest in furniture, &c. to wife, (26 *b*), (9 *a*). Part of plate to wife; Residue to children, (8 *i*). Share of residue under will of father-in-law in trust for wife for life; Then for children, subject to power of selection; Power to settle accounts; Substituted legacy in case of ademption, (18 a^1), (55 h^1), &c., (18 a^2). Share of law books, office furniture, papers, &c. to son, (12 *d*). Devise of trust estate to persons beneficially interested, to uses to bar dower, (68 e^1). Devise of other trust estates to son (*a*), (68 e^2). Power to son to wind up partnership affairs without interference of executors, (48 *n*). Legacy in trust for inalienable use of aunt for life; Then for her two daughters; Provision in case of her becoming imbecile, (43 k^1), &c. Residue of realty and personalty for conversion, omitting the direction to invest, (52 e^1), &c. Trusts for certain existing children and all after-born children; Maintenance and advancement; Moiety of daughters' shares settled for their separate use for life, subject to cesser on alienation; Then for children equally, subject to power of selection; On failure of such issue, for testator's other issue, subject to power of selection; Maintenance, &c.; Power to settle other moieties of daughters marrying under age, (55 i^1), &c. Devise of mortgage estates, (68 *d*). Trustee clauses, and power to appoint new trustees in respect of daughters' shares, (79 *a*), (80 h^1), &c., (80 k^1), (80 l^1), (80 l^2). Power to trustees to decide questions on will, (80 *s*). IN WITNESS &c.

(*a*) This devise of trust estates to the son is obviously a material part of the scheme for securing to him the advantages connected with the testator's professional business.

27. WILL *of a* WIDOWER. FREEHOLD MESSUAGE *to* SON *for* LIFE; REMAINDER (*subject to power of Selection*) *to his* CHILDREN *in fee. In default of Children, to* SECOND SON *and his* CHILDREN. RESIDUE *for* CONVERSION, *for Benefit of* CHILDREN *or their* ISSUE.

27. TRUSTS FOR CHILDREN AND ISSUE, PER STIRPES.

COMMENCEMENT, (1 *a*). Appointment of executors, (3 *c*). Legacies to trustees, (27 *c*). Freeholds to son for life; Remainder to his issue as he shall appoint; In default, to his children equally; Accruer, maintenance, &c.; In default of children of first son, to like uses in favour of second and third sons and their issues, (72 f^1), &c. Residue of realty to be converted and held on trusts of personalty, (52 d^1), &c. Furniture to be divided among children, (9 *l*). Conversion of personalty, (48 c^1), &c. Trusts for children and issue of deceased children; Maintenance, &c. (55 n^1). Devise of trust and mortgage estates, (68 *c*). Trustee clauses, (80 a^1), &c. IN WITNESS &c.

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28. CODICIL *appointing* ADDITIONAL EXECUTOR, TRUSTEE, *and* GUARDIAN.

28. CODICIL ADDING NEW TRUSTEE.

I, [*testator*], of &c., DO DECLARE this to be a codicil to my last will and testament, bearing date on or about the —— day of ——. WHEREAS, by my said will I have given to [*trustees*], of &c., certain estates in and powers over my real and personal estates, upon certain trusts therein expressed and contained; and I have appointed the said [*trustees*] executors of my said will and guardians of my children. AND WHEREAS, since the date and execution of my said will, my eldest son, [*name*], hath attained his age of twenty-one years, and I am desirous to nominate and appoint him to be a trustee and executor of my will, [and guardian of my minor children,] in addition to the trustees, executors, and guardians named therein as aforesaid. NOW I HEREBY [GIVE (*a*), DEVISE,

(*a*) The clause within the brackets is unnecessary; it is sufficient for the testator to intimate his intention that the name of his son shall be added to those of the trustees and executors appointed by his will.

28. CODICIL ADDING NEW TRUSTEE.

BEQUEATH, AND APPOINT unto the said [*trustees of will*], and my said son, [*name*], all and singular my real and personal estates whatsoever and wheresoever, and also all the real and personal estates over which I have any power of appointment, TO HOLD the same UNTO AND TO THE USE of the said [*trustees, including son*], their heirs, executors, administrators, and assigns, UPON THE TRUSTS, and for the intents and purposes, and subject to the powers and declarations in and by my said will expressed and contained concerning my real and personal estates thereby devised, bequeathed, and appointed. AND I NOMINATE AND APPOINT my said son to be one of the executors of my said will, and one of the guardians of my said minor children. AND I] DIRECT AND DECLARE that my said will shall be read and construed in the same manner, and shall have the same operation and effect in all respects, as if my said son [*name*] had been named and appointed a trustee and executor thereof, [and guardian as aforesaid,] together with and in addition to the said [*trustees of will*], and as if the name of the said [*son*] had been in each and every instance throughout the said will added to the names of the said [*trustees of will*], excepting only that it is not my intention that my said son shall have any pecuniary legacy for his trouble in the execution of the trusts of my said will (*a*), as he will take valuable beneficial interests under the trusts thereof. AND in all other respects I RATIFY AND CONFIRM my said will. IN WITNESS &c.

Indeed, the re-disposing of the property requires care ; for, unless the clause is framed in exact conformity and correspondence to the disposing clause in the will, it becomes doubtful whether the dissimilarity is to be ascribed to negligence or to diversity of intention. [If the will contains (as it should contain) a power of appointment over the real estates vested in the trustees or trustee for the time being, it may be difficult to adapt a new devise in the codicil to the powers and limitations ; and in this case, and, indeed, in every other case, the clause within brackets should be omitted.]

(*a*) An expression of intention on this point seems to be necessary, in order to exclude doubt.

29. CODICIL *appointing a new* TRUSTEE *and* EXECUTOR *in the* ROOM *of a Trustee and Executor of the Will, who had died in* TESTATOR'S LIFETIME. 29. CODICIL SUBSTITUTING NEW TRUSTEE.

I, [*testator*], of &c., DO DECLARE this to be a codicil to my last will and testament, bearing date on or about the —— day of ——. WHEREAS, since the date of my said will, [*deceased trustee*], of &c., one of the trustees and executors named therein, hath departed this life: NOW I DO HEREBY APPOINT my friend [*new trustee*], of &c., to be a trustee and executor of my said will in the room and place of the said [*deceased trustee*]. AND I DIRECT AND DECLARE that my said will shall be read and construed in the same manner and shall have the same operation and effect in all respects as if the name of the said [*new trustee*] had been inserted therein, instead of the name of the said [*deceased trustee*]. AND I BEQUEATH to the said [*new trustee*], for his care and trouble in the execution of the trusts of my said will, the legacy or sum of £——, which in and by my said will is given or expressed to be given to the said [*deceased trustee*]. AND I DECLARE, that the said legacy shall be payable at the same time and in the same manner as the legacy for which it is substituted. AND in all other respects I CONFIRM my said will. IN WITNESS &c.

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30. CODICIL *substituting* TWO PERSONS, *in lieu of those named in the Will, as* TRUSTEES *and* EXECUTORS. 30. SUBSTITUTION OF OTHER TRUSTEES AND EXECUTORS.

I, [*testator*], of &c., DO HEREBY DECLARE that my will, dated &c., shall be read and shall take effect as if the names of [*new nominees*], of &c., were written in every part of the said will wherein the names of [*old nominees*] occur, in lieu of such last-mentioned names, and as if such last-mentioned names had been struck out from every part of the said will. IN WITNESS &c.

31. CODICIL AFTER MARRIAGE.

31. CODICIL *made* AFTER MARRIAGE, *confirming the Will, giving an* ANNUITY *to the Testator's* WIFE, *and admitting his* CHILDREN BY HER *to* SHARE *in his* GENERAL ESTATE *with the Children provided for by his Will.*

THIS IS A CODICIL to the will of me, [*testator*], which bears date the —— day of ——. WHEREAS, since the date of the said will, I have intermarried with [*wife*]: Now I HEREBY GIVE to my said wife the annual sum of £——, to be paid to her by equal half-yearly payments, on each —— day of —— and —— day of ——, during her life; With proportional parts thereof in respect of the periods between the day of my death and the first of such days, and between the last of such days and the day of her decease, respectively. AND I DECLARE, that all expressions and gifts contained in my said will, and referring to any child or children of mine otherwise than by name, shall be construed as if I had made the said will, and used the same expressions after my said marriage. IN all other respects I CONFIRM my said will. IN WITNESS &c.

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32. CODICIL AFTER PURCHASE OF REAL ESTATES.

32. CODICIL *made after the* PURCHASE *of* REAL ESTATES.

THIS IS A CODICIL to the will of me, [*testator*], which bears date &c. I GIVE all my freehold and copyhold estates To SUCH USES as my trustees or trustee for the time being shall at any time or times by deed appoint; AND, subject thereto, To THE USE of them and their heirs, IN TRUST, as soon as conveniently may be after my decease, to sell and convert the same into money, and to be possessed of the proceeds upon the trusts declared in my will of my general personal estate (*or, better, discretionary trusts for conversion*, (52 f^1), &c.). I DECLARE, that all the annuities and other legacies, whether pecuniary, demonstrative, or specific, given by my will, shall be paid clear of legacy duty. IN all other respects I CONFIRM my said will. IN WITNESS &c.

33. CODICIL *(to a Will made while the Statute 7 & 8 Vict. c. 76, was in force,)* SUBSTITUTING *for* LIMITATIONS *intended to operate as* EXECUTORY LIMITATIONS *in Fee, but, by the subsequent Statute,* 8 & 9 *Vict. c.* 106, CONVERTED INTO CONTINGENT REMAINDERS, *other* VESTED LIMITATIONS *in Fee, with* EXECUTORY LIMITATIONS OVER *in certain Events* (*a*).

33. CODICIL SUBSTITUTING EXECUTORY LIMITATIONS FOR CONTINGENT REMAINDERS.

I, [*testator*], of &c., DECLARE this to be a codicil to my last will, bearing date the —— day of ——, 1845. WHEREAS, by my said will I have devised my freehold and copyhold hereditaments at —— To the Use of my daughter, [*name*], during her life; And, after her decease, to such uses, in favour of certain objects, as she shall in manner therein mentioned appoint; And, subject thereto, to the use of such child or children of my said daughter as shall attain the age of twenty-one years or die under that age leaving issue, and, if more than one, in equal shares, and his, her, or their heirs and assigns for ever; And by my said will I have limited other estates to like uses in favour of each of my other daughters and their respective appointees and issue. AND WHEREAS, when I made my said will it was the law that no estate could be created to take effect by way of contingent remainder, but every contingent estate was capable of taking effect in the manner of an executory devise, and my said will was made in reliance on that law. AND WHEREAS, by an act of Parliament passed after the making of my said will, intituled "An Act to amend the Law of Real Property," the law has been so amended that my said will is incapable of taking effect according to my intention. Now, in lieu of each limitation respectively in my said will contained, of any freehold or copyhold hereditaments to the use of such child or children of the person specified in such limitation as shall attain the age of twenty-one years or die under that age leaving issue, I DEVISE the same

Recital of will devising realty to such children of testator's daughters as should attain twenty-one or leave issue;

—that stat. 7 & 8 Vict. c. 76, was in force when the will was made;

—that the law has been amended so as to defeat will.

Substitution of vested devise to children in fee; with cross executory limitations in case of death under twenty-one

(*a*) [An account of the extraordinary and mischievous freak of the Legislature, which has created the necessity, it is feared, in too many instances, of a correction of this kind, will be found ante, p. 824.]

33. CODICIL SUBSTITUTING EXECUTORY LIMITATIONS FOR CONTINGENT REMAINDERS.

hereditaments (subject to the limitations, trusts, and powers preceding the last-mentioned limitation,) To THE USE of such child or children of the same specified person as shall be living after my decease, and such child or children of any child of the same person who shall be dead at my decease as shall survive me, and, if more than one, in equal shares, as between or among brothers and sisters, and his, her, or their heirs and assigns for ever, but so that the child or the children collectively of a deceased child shall take only the share which such deceased child would have taken if living; BUT in case any of such children or grandchildren should die under the age of twenty-one years, then I DEVISE his, her, or their share or shares (as well under this substitutionary limitation as under the foregoing original limitation) To THE USES herein limited concerning the other share or shares of the said hereditaments. PROVIDED, that no child or grandchild shall take under the foregoing limitation in default of appointment, without bringing into distribution or allowing for the benefit of any appointment which shall have been made to him or her or to his or her issue. AND if no such child or grandchild should be living after my decease and attain the age of twenty-one years or die under that age leaving issue, then I DEVISE the said hereditaments to and upon the ulterior uses and trusts thereof limited by my said will. AND I DIRECT AND DECLARE, that all the trusts and powers in my said will contained with respect to all or any of the estates therein limited as aforesaid in default of appointment, shall extend and be applicable as nearly as may be to the respective estates hereby limited in substitution for the same. PROVIDED ALWAYS, that it shall be lawful for the trustees or trustee for the time being of my will, at any time or times before the expiration of twenty-one years from the decease of the survivor of the several persons mentioned by name in my will, by any deed or deeds, to appoint any uses of any freehold or copyhold hereditaments over which I shall at my decease have any beneficial disposing power; And I give this power to my said trustees or trustee, IN TRUST, that, in case the law should be again amended in such manner as to give to any limitation or disposition of real estate contained in my will or in any codicil thereto an effect different from the effect which it would have had if the law actually promulgated before, and supposed to be in force at, the time of the execution of

without issue, and substitution of children of deceased children.

Hotchpot.

Trusts and powers in will to extend to substituted estates.

Power of appointment to trustees, in trust to protect the testator's will against future amendments of the law.

such will or codicil had remained unaltered, my said trustees or trustee will make such limitations, appointments, and dispositions as they or he shall think necessary or expedient for the purpose of giving such effect to my said will and codicil or codicils as the same would have had if the law had not been so amended. And in all other respects I confirm my said will. In witness &c.

33. CODICIL SUBSTITUTING EXECUTORY LIMITATIONS FOR CONTINGENT REMAINDERS.

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34. REVIVAL *of a Will revoked by* MARRIAGE (*a*).

34. REVIVAL OF A WILL.

I HEREBY DECLARE, that the above-written will shall operate and be construed, as to persons and things, as if I had made the same on this —— day of ——, in the year ——. In witness &c. (*b*).

Or, if the Revival is by a separate Instrument,

WHEREAS I, [*testator*], of &c., made my will on the —— day of ——, in the year ——, and have since intermarried with [*name*]: Now I HEREBY REVIVE AND CONFIRM the said will, And DECLARE that the same shall operate and be construed, as to persons and things, as if I had made the same on this —— day of ——, in the year ——. In witness &c.

(*a*) [It must be remembered that marriage is not an absolute revocation of every will; for an appointment made in exercise of a power simply collateral will remain unaffected by the marriage. (Stat. 7 Will. 4 & 1 Vict. c. 26, s. 18). Upon the wording of that section, it seems to be clear, that an appointment under a power which is followed by a limitation in default of appointment, to persons who *might* sustain the character of heir or next of kin of the donee, but who are not so described, is within the saving, and would not be revoked by marriage.]

(*b*) [Care must be taken here, as in every other case of attestation, not to allow a person to whom any beneficial interest is given by the will, nor the wife or husband of such a person, to be a witness. The penalty is the loss of the gift to the witness.]

35. ALTERATION OF WILL.

35. MEMORANDUM *of* ALTERATION *and* RE-EXECUTION *of a* WILL.

BE IT REMEMBERED, that I, [*testator*], have made in my own handwriting, [*or*, caused to be made], in this my will, the alterations hereinafter specified; (that is to say), in the twenty-first line of the first page, the words [*words*] are erased, and the words [*words*] are inserted in their stead. THE words [*words*] in the seventh line of the second page, and the eighth, ninth, and tenth lines of the same page, and the words [*words*] in the eleventh line of the same page, are erased. BETWEEN the words [*words*] and [*words,*] in the nineteenth line of the same page, the words [*words*] are inserted. I DECLARE the above writing so altered to be my will. IN WITNESS &c.

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36. MARGINAL ALTERATION.

36. MARGINAL ALTERATION *in a* WILL.

FOR (*a*) the words [*words*] through which I have drawn my pen, [*or*, which I have caused to be erased], it is my will that the words [*words*] be inserted. IN WITNESS &c.

(*a*) [If the marginal alteration be not written opposite to the part of the will which is intended to be corrected, some mark of reference should be affixed to the passage, and a corresponding mark to the marginal correction.]

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37. REVOCATION.

37. SIMPLE REVOCATION *of a* WILL.

I, [*testator*], of &c., HEREBY REVOKE an instrument bearing date &c., and purporting to be my last will, which instrument I have deposited with [*name*], of &c. IN WITNESS &c.

38. CODICIL REVIVING *a Will previously revoked.*

38. REVIVAL OF REVOKED WILL.

WHEREAS I, [*testator*], of ——, made my will on the —— day of ——, and have since revoked the same. Now, I hereby annul such revocation, and declare that the said will is valid and subsisting (*a*). IN WITNESS &c.

39. *Another Form.*

39. ANOTHER FORM OF REVIVAL.

WHEREAS I, [*testator*], of ——, duly made my will on the —— day of ——, and by two codicils thereto, bearing date respectively the —— day of ——, &c., have partially altered the disposition of my property contained in my said will; And by another codicil thereto, bearing date &c., have wholly revoked my said will, together with the two first-mentioned codicils thereto. Now, I revoke the said codicil of the —— day of ——, and also the codicil of the —— day of ——; And I declare my said will, and the codicil thereto which bears date the —— day of ——, to be and contain my last will. IN WITNESS &c.

(*a*) [If the will was made before the year 1838, it will be proper to see that its provisions are capable of taking effect under the new law, according to the intention. A will devising lands, revoked before the year 1838, may be revived by a codicil attested by two witnesses: *Andrews* v. *Turner*, 3 Q. B. R. 177. See *Brooks* v. *Kent*, 3 E. F. Moore, 334; *Ferraris* v. *Hertford*, 3 Curt. 468. As to republication, see *Doe* d. *York* v. *Walker*, 12 Mee & W. 590.]

END OF THE PRECEDENTS.

SUGGESTIONS

TO

PERSONS TAKING INSTRUCTIONS FOR AND PREPARING WILLS (a).

[If your client possesses a considerable leasehold or permanently invested personal property, it should be suggested to him that he may save the probate and legacy duties, without relinquishing dominion over the property, by means of a revocable settlement. Vide ante, pp. 5, 6. This is very important where the objects to be provided for are illegitimate children, as the legacy duty would be at the highest rate, of ten per cent.] Suggestion as to a settlement in lieu of will.

[When your client intends that his estate shall devolve in the way in which it would do if he died intestate, he should be made aware, that by means of a will he may save the difference between the administration and probate duties, and invest the executors with more ample powers in winding up the affairs than an administrator would possess (vide ante, p. 411), and, if there is real estate which would descend to an infant, may provide for the proper management of it.] As to intestacy.

Inquire what is the nature of the testator's property? If it comprises freehold, copyhold, or leasehold estates, are any of such estates in mortgage; and, if so, are the devisees or legatees to take cum onere; if not, out of what fund is the estate to be disencumbered? [in which case the intention should be unequivocally expressed, giving it merely "subject to the mortgage" not being sufficient. Ante, p. 797.] Nature of testator's property.

[Where real estates are to be specifically devised, the title-deeds, or a recent abstract of the title, should if possible be seen. The neglect of such investigation often occasions the omission of small parcels, or even more serious misdescriptions, misstatements of tenure, omission of special provisions adapted to the state of the title, &c. See p. 790. Investigation of title.

(a) To many practitioners some of the Suggestions in the text will appear, and in fact will be, superfluous; but they will not the less readily assent to the propriety of the insertion of such matter for the use of their less experienced brethren.

And if the testator has made a marriage or other settlement, or is entitled to any interest in settled property, the settlement or will should be inspected, in order to ascertain the nature and extent of his interest and powers. Under his marriage settlement he may have a power of jointuring and charging portions, and would probably possess a general power of appointment in default of issue. The result of such inspection may sometimes be to shew, that the property which the testator supposes to be at his own disposal is tied up by his settlement.]

Mortgage and trust estates.

Powers.

Without express instructions, the will-maker may devise the testator's trust and mortgage estates not specifically disposed of, and exercise his powers (if any) over the beneficial interest in real and personal estate; for inquiry on these points (which are of a technical nature) would probably elicit imperfect information, and it is always to be remembered, that the hazard of redundancy is preferable to that of deficiency.

Contract for sale or purchase.

[Is any contract for the sale or purchase of real estate pending, or likely to be pending at the testator's death? If so, the destination of the purchase-money or of the estate should be provided for; and if it is to be devised in settlement or on trust, power should be given to the trustees to deal with the contract. See Vol. IX, p. 437, n.; ante, pp. 793, 795. In the case of a contract for purchase, provision should be made for any question which may arise between the devisee and the residuary legatee, in case the contract should not be strictly enforceable, and for compensating the devisee if the contract fails.]

Partnership.

[Is the testator in partnership, either in his general business or in any particular adventure? If so, how is his interest to be dealt with? The articles of partnership should be examined, in order to see if they contain any power to be exercised by will. See pp. 453, 454, 579, 593.

Wife's leaseholds and choses en action.

[Testators frequently consider themselves to be absolutely entitled to leaseholds and legal and equitable choses en action belonging to their wives, and suppose that they can dispose of such property by will. Sometimes even the wife's separate property is so regarded. Attention should be directed to the wife's title by survivorship. Although the widow would be put to her election by a specific gift of such property to another, no case of election could be made against her by a mere residuary legatee.]

Testator holding money belonging to his children.

[Testators sometimes receive monies belonging to their children, for which the latter hold no security or acknowledgment. Inquiry should in all cases be made as to the existence, or the probability of

the future existence, of any unsettled accounts or claims between the testator and his children.]

[Are any of the legatees, or husbands of legatees, indebted to the testator; and if so, are the debts to be brought into account? Are advancements by the testator to be accounted for? Are legacies to creditors of the testator to go in satisfaction of their claims? See pp. 463, 464, 506, 775, et seq.] Legacies to debtors and creditors. Advancements.

[How are mortgage debts to be borne? Debts not otherwise provided for are payable out of the residuary personal (and real?) estate before real or personal property specifically devised or bequeathed is applied; and if the residue is not sufficient, specific legatees and devisees must contribute rateably: *Tombs* v. *Roch*, 2 Coll. 490. Pecuniary legatees cannot claim contribution from specific legatees; but whether they have now any right, either of marshalling or for contribution, against residuary devisees, remains to be decided. See *Mirehouse* v. *Scaife*, 2 Myl. & Cr. 695; *Tombs* v. *Roch*. The devisee of an estate in mortgage, however, is not entitled to exoneration or contribution by specific devisees or legatees, or even by pecuniary legatees; but, in the case of a will operating under the new law, the residuary devisee must, it is presumed, exonerate a specifically devised estate in mortgage. It should be ascertained whether the testator intends that this rule should operate in case the circumstances of his estate give occasion for its application. See pp. 797, 812, 814.] Exoneration of mortgaged estates.

[The emblements on a devised estate are often of great value; and though if the estate descends they would go to the executor and not to the heir, yet when it is devised, they go to the devisee in the absence of a provision to the contrary, thus giving him a great advantage over a pecuniary legatee, or a general legatee for life, who is not entitled to interest during the first year. The testator's intention on this head should be ascertained.] Emblements.

[Property should not be specifically given without a special reason, because such gifts are liable to ademption. On the other hand, they are favoured in the administration of the assets.] Specific gifts.

[Is any specific fund to be appropriated for payment of debts, funeral and testamentary expenses, and legacies, in exoneration, either of all the other property of the testator, or of particular portions of it? or is the real estate to be charged in aid of the personalty? See pp. 436, 807 et seq.] Fund for debts and legacies.

[Are leaseholds to follow the destination of the freeholds, or to be converted with the personal estate?] Leaseholds.

Is the general residuary real or personal estate to be subject to a trust for conversion, or to remain in statu quo, and with any and Conversion.

what exceptions (e. g. household domestic effects, and especially articles of consumption)? And are the trustees to have any and what discretionary power to delay or suspend the conversion? See pp. 562 et seq., 572, 573, 596—651.

Income from leaseholds and precarious investments.

Reversions.

[Is the actual income arising from investments or property of a precarious or perishable nature to be enjoyed as income during any suspension of conversion? And what discretion is to be vested in the trustees as to such property, and also as to reversionary and other property not immediately saleable with advantage? See pp. 637 et seq., 936.]

Discretionary trust for conversion.

[If the disposition of the proceeds of real estate directed to be sold is such that the legatees may possibly elect to take the land in specie, or may arrange among themselves to sell it, it should be given subject to a *discretionary* power of sale, in order to avoid the legacy duty. Vide ante, p. 612 (*a*).]

As to investments.

[What (if any) investments of an unusual character (as railway debentures, shares in railway or other companies, leaseholds, &c.)

Attorney-General v. *Simcox*. Proceeds of realty sold under a discretionary power held liable to legacy duty.

(*a*) [But see *Attorney-General* v. *Simcox*, 1 Exch. Rep. 749, reported after the observations, ante, p. 612, were printed. In that case the testator devised freehold estates to trustees in trust to pay the rents to his brothers and sisters, and the survivors and survivor of them, for their lives and the life of the survivor; and after the death of the survivor, to convey the estates to the testator's nephews and nieces equally, as nearly as they could make partition. And, for the purpose of such partition, the trustees were authorised to sell all or any part of the said estates, and to hold the proceeds upon the trusts declared of the residue of the personal estate (being similar to the trusts of the realty). After the death of the surviving tenant for life the trustees sold the estates, and the Court of Exchequer held that legacy duty was payable on the proceeds. In delivering judgment, Pollock, C. B., rested the decision on this ground—that the estate was equally "directed" to be sold, in event, whether the testator himself gave an imperative direction, or merely authorised another person to give such direction or to act as if it had been given, if in the latter case, the authority was exercised—and treated *Attorney-General* v. *Mangles*, 5 M. & W. 120, (ante, Vol. IX, p. 675), as an authority in point overruling *In re Evans*, 2 C. M. & R. 206. But as *Attorney-General* v. *Mangles* was clearly erroneous on the only point which was argued, and as the rule laid down in *Attorney-General* v. *Simcox* is inconsistent with the principle established by numerous cases (including a decision of the House of Lords, *Williamson* v. *Advocate-General*, 10 Cl. & Fin. 1), and if followed to its legitimate consequences would lead to the most extravagant conclusions, that case cannot be considered as having settled the law on this important point. In the meantime it will be prudent, in framing a discretionary power of selling real estate, to insert a direction to invest the proceeds of any sale in the purchase of other real estates, with a power, until such purchase can be effected, to invest in the funds or on mortgage. This would protect the proceeds of sale from legacy duty, unless the Court of Exchequer should hold that duty is payable upon sales under the power usually inserted in strict settlements by will.]

Precaution suggested by the above case.

are to be authorised? See pp. 566, 575. Whether, where a son or other near object of the testator's regard is in business, the trustees are to lend any trust money to him, and to what amount and on what security? See pp. 583, 587, 601. Whether any securities which the testator may possess at his death are to be retained, and, in case they consist of shares in a company not fully paid up, whether the trustees are to pay calls? Whether any indulgence is to be shewn to any particular debtors? See pp. 543, 573, 601, 939.] Loan to son, &c. Retaining testator's investments, &c.

What (if any) discretion is to be vested in trustees to pay unproved demands—waive doubtful rights of the testator—give indulgences to debtors—refer disputes to arbitration—and invest trust monies in any and what securities (including the purchase of real estates). See pp. 562, 567 et seq. Some of these powers, indeed, with others, should be inserted as a matter of course, without express instructions. See pp. 598—652. Such are, powers to invest trust monies on government or real securities, and vary securities—to apply the income of the shares of minors not otherwise provided for (especially of the testator's children) for their maintenance, and a definite portion of the principal for their advancement (p. 768)—to give full discharges for trust monies received—and to supply vacancies in the trusteeship: Pp. 902, 927. Discretionary powers of trustees.

[Are the trustees to be empowered to appoint agents, bailiffs, &c., to cut timber, repair, insure, lease, open and work mines, &c.? Pp. 614, 873 et seq.] Power to manage.

[May trustees purchase trust property? May trustees, being solicitors, auctioneers, or surveyors, transact and charge for business?] Privileges to trustees.

[A person who takes only a partial interest under the will should seldom be appointed sole executor or trustee.] Sole executor.

[Is the wife or other head of the family to have a legacy for immediate use? P. 502. Such a gift is generally proper.] Immediate legacy to wife.

[Who is to take the consumable household stores? P. 440. It is seldom intended that they should be sold.] Consumable stores.

[Is the widow to take any benefit given to her in lieu of dower? P. 898. The will should, in all cases where the testator was married to his present wife before January 2, 1834, contain an express declaration on the point, as few questions are more difficult, or are governed by rules more opposed to ordinary notions, than those relating to the bar of dower at the election of the widow. See 1 Jarm. on Wills, 396; *Holditch* v. *Holditch*, 2 Y. & C. C. C. 18; *O'Hara* v. *Chaine*, 5 Jo. & Lat. 662; *Ellis* v. *Lewis*, 3 Hare, 300; *Lowes* v. *Lowes*, 5 Hare, 501; *Grayson* v. *Deakin*, 13 Jur. 145.] Dower.

[If the testator has no children, but there is a possibility of his Provision for

possibility of issue.

having any by his present wife, provision should invariably be made for such a contingency. See pp. 430, 757. The same precaution should be observed where existing children are provided for by name. See p. 684.]

Legitimacy of legatees.

[If you have not certain knowledge on the point, endeavour to learn whether there is any doubt as to the legitimacy of any of the testator's children, or the legality or fact of his marriage with his reputed wife; and suggest the consequences of an insufficient description of such objects by their reputed character only. See p. 514.]

Gifts to illegitimate persons.

[If provision is made for illegitimate persons, inquire what is to become of the property in case of their death under age or without having effectually (see p. 763) disposed of it by will or otherwise. A mere annuity or life interest will often be the best provision; but if an interest in the capital is to be given, the best course, in order to exclude the title of the Crown in all events, is to confer on such objects a life estate, with a power of appointing the corpus by deed or will, and to insert a gift over in default of appointment.]

Illegitimacy of testator.

[If the testator himself is illegitimate, or has no near relations, more than ordinary care should be taken to prevent intestacy.]

Legacy duty: reputed wife and children.

[Legacies to illegitimate children or to a reputed wife (especially annuities) should be given clear of all deductions, which will exempt them from legacy duty.]

Income to widow for maintenance of children.

[Where children are to be maintained by the widow, it should be made clear whether she is to have a discretion as to the proportion, and whether their right to maintenance is to cease on their attaining twenty-one or marrying, (see pp. 485, 519, 652, 669, 771); and, if it is then to cease, some provision for them should be made, to take effect in possession in that event. See *Pride* v. *Fooks*, 2 Beav. 430; *Conolly* v. *Farrell*, 8 Beav. 347; *Re Camac's Trust*, 12 Jur. 470; *Longmore* v. *Elcum*, 2 Y. & C. 363.]

Power to apportion maintenance funds.

[Provisions for maintenance usually confine each object to the benefit of the income from his own expectant or vested share. It is better to make a common fund of the shares of all the minors for the time being, to be applied in such proportions as the trustees think fit. See p. 925, n.]

Separate use. Maintenance.

If the legatee or annuitant is a married woman, or a woman likely to marry, is the legacy intended for her separate use? If a minor, is it to be paid at majority? and, in such case, is the interest in the meantime to be applied for maintenance, or how otherwise?

Lunacy, improvidence, insolvency, &c.

If the legatee is lunatic, or mentally imbecile, [or of weak character, deaf and dumb, improvident, insolvent, or an uncertificated bankrupt,] what (for there should be some) extraordinary powers are to

be given to the trustees to apply the legacy for the benefit of the legatee? [A gift to the wife of a legatee so situated, or of a legatee in trade, for her separate use, with or without a restriction on alienation, according to circumstances, may be expedient. (See p. 555.) Sometimes the situation or character of the legatee may be such as to render a simple gift over on alienation proper and sufficient. See pp. 473, 485 et seq., 510, 547, 550 et seq., 559, 679, 690, 711, 755.]

Power to settle shares of infant legatees.

[Are the trustees to have power to settle the legacies or shares of legatees or devisees marrying in infancy, or (which is better) are such legacies to be absolutely settled in such event? See pp. 519, 520, 652, 665, 674.]

Authority to pay small legacies to parents of infant legatees.

[It is often both convenient to the trustees and useful to the objects to authorise the payment or delivery of pecuniary or specific legacies, of small amount or value, to the parents of infant legatees, with a direction that their receipts shall discharge the trustees. See pp. 528, 531.]

Power to appoint life interest to wife or husband.

[Is any legatee or devisee for life to have a power to appoint a life interest or annuity to a surviving wife or husband? Such a power, in the case of a female legatee, should be made exercisable by will only. See pp. 667, 677, 930.]

General power in default of issue.

[Is a legatee or devisee for life to have a general power of appointment (confined in case of coverture to will) in default of issue? and how is the property to go in default of issue, in case such power is not exercised, or not given? See pp. 543, 546, 655, 658, 666.]

Payment of legacies, interest, &c.

At what time are pecuniary legacies (if any) to be paid? are such legacies to carry interest, and if so, from what time, and at what rate, and whether to be paid free from legacy duty, and how to abate in case of deficiency of assets? See pp. 502 et seq., 773 et seq., 483.

Annuities.

How are annuities to be raised and secured, whether by the charge or appropriation of a particular fund or estate, or by the executors purchasing a government annuity or otherwise, when to commence, and at what intervals to be payable, and if intended to be free from legacy duty? See pp. 466 et seq.

Deferred income of legatee for life.

[Annuities (including rent-charges) and life interests should be given clear of legacy duty. Where a life interest is given in a specific fund or in the residuary personalty or any share of the residue, the tenant for life has income or interest from the testator's death; but in the case of a general legacy of money or stock, the tenant for life will have no income in respect of the first year, unless it is expressly given to him. See p. 472.]

Contingent gifts.

If property is given on a contingency (whether that of the devisee or legatee attaining a specified age or any other event), what is to become of it, in the alternative event of the devisee or legatee dying under the vesting age, &c.?

Lapse.

What (if any) provision is to be made for the event of any legatee or devisee dying in the testator's lifetime or before the vesting of his interest, by substituting the children of the deceased, &c.? See pp. 509, 530, 594, 656, 779, 791, 803.

Gifts over; survivorship, &c.

[Where the share or legacy of one of several devisees or legatees is to be given over on his death under contingent circumstances, or in any given event, ascertain and express with precision whether the gift over is to be for the benefit of the survivors, or of the *others*,—whether it is to include accrued shares or not,—whether the accrued shares are in all respects (or, so far as the rule against perpetuities will permit) to be subject to the same conditions as the original shares. And in all limitations to *survivors*, express the time at which the class of survivors is to be ascertained.]

Deferred gift.

[If there is a gift which may not take effect immediately, what is to become of the intermediate income?]

Strict settlement.

[In limitations in tail, are the testator's own daughters to take before the daughters of his sons or grandsons? If so, the order of the limitations will be, to the first and other sons and their sons successively in tail male, remainder to the testator's daughters either as tenants in common or successively for life, and to their sons in tail male, remainder to the sons (or sons' sons) in tail general, remainder to the daughters in tail general. If not, the limitation to the sons (or sons' sons) in tail general will precede the limitation to the daughters.]

Power of selection in strict settlement.

[Mr. Watkins recommends, that in a marriage settlement, in order to preserve some control over the children, a power should be given to the parents or the survivor to limit an estate tail to a younger in preference to an elder son. The same thing may be done in settlements by will. But the utility of a power of selection depends entirely on the character of the person to whom it is confided.]

Deferred gifts to classes.

[In framing deferred gifts to children, or to any other class of objects capable of future augmentation, if there is no prior life interest, or one which may determine while the class is still capable of augmentation, expressly extend the gift, if that is the intention, to all members of the class coming into existence as well after as before the time when the fund or estate would otherwise be divisible. See p. 724.]

Legal estate to females.

[Where the legal estate in lands or in a rent-charge is given to a female, it should be accompanied with a power of appointment, in

order to save the necessity of an acknowledgment in case she should have occasion to deal with it while under coverture. This is especially important where an annuity is charged on the whole of the real estate. See pp. 496, 795.]

Charges on land for inalienable use of married women.

[Where an inalienable provision for a married woman is charged upon land, it should be confined to a specific estate, or be accompanied with apt provisions for shifting the security.]

Estates in mortgage.

[An estate in mortgage should never be devised in settlement without giving power to the trustees to pay off or otherwise deal with the incumbrance, and to give discharges for, and invest the surplus proceeds of any sale to be made by the mortgagee. See pp. 812, 814.]

Splitting of estates held under one title.

Provision for easements.

[Where an estate held under one title is devised in parcels, provision should be made for the custody of the title-deeds; and, in the case of contiguous properties, for any rights of way or other easements that may be required for the full enjoyment of any parcel. See p. 804. And if property included in one mortgage is devised in parcels to different persons cum onere, the proportions in which the charge is to be borne should be stated.]

Splitting of estates in mortgage devised cum onere.

Power of appointment over copyholds.

[In disposing of copyholds (whether vested in the testator beneficially, or as mortgagee or trustee), invariably vest a power of appointment either in trustees or in the beneficial devisee. Sometimes it may be expedient to give such a power to both, that of the trustees overriding the other. Where the power is given to trustees, it should be made to accompany the office, as in (59 *d* [1]); and see p. 604. Where it is given to a beneficial taker, it should be made exercisable by will; so that in case of his death before admittance, his testamentary appointee will not have to pay a double set of fees and fines. The existence of a power of appointment over copyholds may often be the means of saving many hundreds of pounds to the estate. If the legal estate is not vested in the trustees, they should be empowered to receive the rents for the maintenance of minors.]

Witnesses.

As the last, and not the least important precaution, the testator's solicitor should select as attesting witnesses persons of respectability and intelligence, not being devisees or legatees, or the husbands of devisees or legatees.

MEMORANDA OF USUAL PROVISIONS.

[The following memoranda of some of the most usual provisions in wills may be useful by way of suggestion, when a will is to be prepared in haste:—

Provisions for Wife.]—[Immediate legacy, consumable stores, furniture, further legacy to be paid at the usual time (p. 450). Income for life or during widowhood (pp. 652, 669, 671, 481, 750),

or, annuity for life or during widowhood, or reducible on marriage (pp. 476, 477, 489, 717, 924), or, substitution of annuity for life interest in case of marriage (p. 799). Income, charged with maintenance of children and issue of deceased children, either during infancy or not, or, as to daughters, during their discoverture (pp. 485, 771, 741). House for residence, on condition of repairing and insuring, with power on default for trustees to repair, &c., and recover expenses (pp. 627, 791, 826, 893, 642). Wife to share the capital with the children, or to take a fixed share (pp. 761, 707). Whether to have actual income of unconverted property (pp. 573, 637). To give up dower (p. 898).]

Provisions for Children.]—[Power of selection given to parent as to all or part of the fund, exercisable by deed or will or by will only; Power to appoint to issue of *living* children (see p. 535). Appointments not to vest in unmarried infants. In default of appointment, to children and issue of deceased children, per stirpes, sons at twenty-one, daughters at twenty-one or marriage, or sons and daughters at twenty-one or marriage, or sons and daughters attaining twenty-one or leaving issue (pp. 535 et seq., 652 et seq., 930); or to vest at twenty-five (pp. 671, 677, 739), or on marriage with consent of guardians or, (as to grandchildren, &c., of whom testator cannot appoint guardians,) with consent of trustees (p. 921). If vesting not dependent on marriage or leaving issue, substitute issue in case of death before vesting (p. 671). Vesting should not be made to depend on survivorship (see pp. 658, 738). Maintenance, education, and advancement. Shares of daughters [marrying under twenty-one] to be held in trust for them for separate and inalienable use for life, and then to their children, with power of selection during coverture by will and during discoverture by deed or will; hotchpot; power to appoint life interests to husbands; maintenance, education, and advancement; general power of appointment during coverture by will only; in default of issue, ultimate limitation to persons who would be entitled under Statutes of Distributions in case of death without having been married (see pp. 519, 652 et seq.).]

[Immediate legacy to children during wife's life (p. 921).]

[Daughters' shares for their separate and inalienable use during coverture, with testamentary power of appointment (pp. 532, 708, 745, 795, 796).]

[Life interest to cease on alienation—children of living persons, who do not take absolute life interests, to be entitled whenever born (55 *i*[13]).]

Children, Infants, &c.]—[Investment of legacies and shares (*a*); Power to vary investments (p. 770). Maintenance out of income or capital, and advancement (pp. 660, 768). Power to receive rents, to manage, cut timber, lease, sell, exchange, &c. (pp. 614, 873 et seq.) Power to pay small legacies to father or guardian (pp. 528, 531). Power to pay maintenance fund to parent or guardian, without seeing to application or inquiring as to competence of father, &c. (p. 768). Maintenance by wife, and direction as to amount which each child may claim (pp. 485, 519, 652, 669, 771).]

Children—Classes—Tenants in Common.]—[Substitution of issue of objects dying before testator, or before vesting; Cross limitations of shares of those dying without issue; accrued shares to pass by clause of accruer, and to be on same trusts as original shares (pp. 694, 757 et seq., 821 et seq.) Power to trustees to make partition and charge sums for equality of partition (pp. 595, 621, 813, 947).]

Legacies.]—[When to be paid; Interest, priorities, and abatement; Legacy duty; Provision against lapse (pp. 502 et seq., 772 et seq.) Charge on realty, with power to sell and mortgage, and to postpone raising, and to raise interest for maintenance (pp. 807 et seq.) Investment of infants' legacies; Maintenance out of income or capital; Power to pay to parent of infant; Lapse; Substitution of children (pp. 768 et seq.).]

Annuities and Rent-Charges.]—[From when to commence; When to be first paid; At what times payable; Apportionment; Free of legacy duty; Power to set apart fund for, and to pay out of capital of fund, if income deficient; Power to purchase, annuitant not to take purchase-money; For separate use of female annuitant; To cease on alienation (pp. 466 et seq.).]

[Whether annuity is to be charged on land exclusively, or only in aid of the personalty; Powers of distress and entry; Term to secure;

(*a*) [Executors should be authorised to invest legacies belonging to minors, instead of paying them into court under the stat. 36 Geo. 3, c. 52, s. 32. In a recent case a decree was made against executors, with costs, for payment of a legacy of 50*l.*, with 4 per cent. interest, which they had invested in the Consols instead of paying into the Bank, although by so doing the expense of getting the fund out of court was saved: *Rimell* v. *Simpson*, 18 L. J., Ch., 55.]

Power to exonerate particular lands; If charged on leaseholds, demise to secure (pp. 489 et seq.) Provision in case of sale or mortgage of land (pp. 649 et seq.) Power to discharge part of the land (p. 469).]

Life Interest in Residue or Share of Residue, or in general Legacy of Money or Stock.]—Whether income of residue to be enjoyed in specie; Free of legacy duty; Income of residue during the first year to be accumulated, in which case, or when the life interest is in a general legacy of money or stock, an immediate legacy should be given in lieu of income during the first year. See p. 472.]

Real Estate.]—[Charge of debts and legacies, and power to trustees to raise by sale or mortgage, to make special conditions, give mortgagee power of sale, and to appoint legal estate (pp. 807 et seq.) Conversion absolute or discretionary; Power to trustees to appoint uses of freeholds or copyholds, receive rents of copyholds, (pp. 596 et seq., 796, 818). Power to tenants for life or trustees to grant husbandry, building, improving, and mining leases, to sell, exchange, partition, revoke and appoint uses, re-invest purchase-monies, and vary investments; Enfranchise copyholds, renew leases of, and grant licenses to demise copyholds; To manage, repair, insure, cut timber for repairs or for sale, work and open mines, appoint bailiffs; To sell and purchase or exchange subject to or under special conditions, waive requisitions, &c. (pp. 873 et seq.).]

[If the legal estate is to be limited to the members of a class who attain a certain age, or marry, &c., it should not be limited by way of contingent remainder, under which those only can take who answer the description at the death of the tenant for life; but the estate should be limited to vest immediately in all the members of the class, with cross executory limitations in case of death before attaining the required age, or marrying, &c. See pp. 818, 975. The safest course, if the practitioner does not feel competent to draw such executory limitations in fee, is to devise to the objects as tenants in common in tail, with cross remainders in tail, wholly omitting the condition of attaining twenty-one: P. 821.]

Conversion.]—[Absolute or discretionary power to sell under special conditions, &c.; To appoint copyholds; To pay debts and legacies; To invest and vary investments; Before sale, to lease, manage, repair, insure, &c.; To receive rents of copyholds; To give receipts

(pp. 596 et seq.) Power to postpone conversion; Declaration as to income in the meantime (pp. 637 et seq.).]

Charges and Incumbrances on Realty.]—[Whether to be charged on the land exclusively, or only in aid of personalty; Power to pay off, by selling or mortgaging, to give mortgagees power of sale, &c.; Power to deal with existing incumbrances; To receive surplus proceeds in case of sale by a mortgagee (pp. 812 et seq.). Whether devisee is to take cum onere (p. 797).]

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Copyholds.—[Power to trustees to appoint uses, subject to which the legal estate is devised directly to the persons intended to take beneficially, or, if that cannot be done conveniently, is left to descend to the heir, subject to the trusts and to the control of the trustees; Power to trustees to receive and apply rents during minorities, to lease, &c. (pp. 602 et seq., 926).]

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